IN THE

Supreme Court of the United States

MICHAEL RODAK,

October Term, 1973

No. 73-854

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

In Proceedings for the Reorganization of a Railroad

DAVID C. BEVAN, *Petitioner*

v.

TRUSTEES OF PENN CENTRAL TRANSPORTATION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

In the Matter of
Penn Central Transportation Company, *Debtor*
In Proceedings for the Reorganization of a Railroad

David C. Bevan, *Petitioner*

v.

Trustees of Penn Central Transportation Company

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, David C. Bevan, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on August 21, 1973, rehearing denied October 9, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit filed August 21, 1973, as yet unreported, appears at Appendix A, *infra* at p. 19.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 354 F. Supp. 408 and appears at Appendix B, *infra* at p. 31.

JURISDICTION

The judgment of the Court of Appeals (p. 19, *infra*), was entered on August 21, 1973. A timely petition for rehearing was denied on October 9, 1973 and this petition was filed with this Court within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 70a of the Bankruptcy Act, 11 U.S.C. §110a, provides in pertinent part as follows:

> [T]he trustee of the estate of a bankrupt . . . upon his . . . appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act . . . to all of the following kinds of property wherever located . . .
>
> (5) [P]roperty, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered.

QUESTIONS PRESENTED

1. Whether, notwithstanding the limitations of Section 70a of the Bankruptcy Act and this Court's decision in *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962), a bankruptcy court has power to:

(a) Arbitrarily decree that petitioner may receive only $50,000 per year of his pension rights which vested prior to the reorganization proceedings, thereby appropriating to the Trustees the balance of $27,000 per year owing to petitioner; and (b) transfer to the Trustees ownership of petitioner's contributions of $325,000 to a Fund, built up over a period of eighteen years, pursuant to an agreement under which:

(i) the corporation was not required to and never did contribute a single dollar to the Fund;

(ii) all the securities in the Fund were bought solely with money withheld from the employees' salaries and were never comingled with securities owned by the corporation;

(iii) although the agreement specifically stated that the Fund should be available for any corporate purpose, the corporation never claimed the Fund was an asset of the corporation, never attempted to use the Fund for any corporate purpose or for collateral, and never reflected the Fund in its net worth; and

(iv) the Plan specified that the employee became entitled to be repaid his contributions and income thereon in ten annual installments when he retired (as petitioner did) before reaching age 65, and also that such repayment shall be made if operation of the Fund is suspended (which it was)?

2. Whether a bankruptcy court can constitutionally be given "discretion" to confiscate all but $50,000 per year of petitioner's vested rights in the railroad's pension funds, and $325,000 which petitioner contributed to another fund built up solely from employees' own contributions?

STATEMENT OF THE CASE

At the time the reorganization proceedings were initiated, petitioner Bevan, a retired employee of the Penn Central Transportation Company, had vested rights to pension payments in excess of $75,000 per year. This fact is undisputed.

Petitioner Bevan was also one of more than one hundred employees of the Penn Central Transportation Company who received a "Total Annual Salary" which consisted partly of "Basic Annual Cash Salary" and partly of "Contingent Allotment Per Annum". Mr. Bevan's total annual salary was paid in this manner from 1952 to June, 1970 when he retired at age 64, pursuant to a "Contingent Compensation Plan." The Plan itself states that: "The purpose of this Plan is to assist the Penn Central Transportation Company in attracting and retaining individuals for executive and other key positions."

The Plan specified in Section 701 that if an employee retired before reaching 65, as Mr. Bevan did on June 8, 1970, "the amount of his contingent allotments shall be paid to him" in ten annual installments beginning at least six months after he attains age 65 and to be completed no more than ten years and seven months from that date.

The Plan also specified in Section 408 that the Board could suspend or terminate operation of the contingent compensation Fund (which it did on June 20, 1970 effective June 1, 1970) and that the Fund should thereupon be evaluated and the participants' allotments paid to them as provided in the Plan.

On October 6, 1970, counsel for the Trustees advised Mr. Bevan's counsel that "the amount of contingent compensation allocated to Mr. Bevan's account in the Contingent Compensation Plan was valued at $566,333.26, which, subject to the terms of the Plan, is payable to him in ten (10) annual installments commencing March 15, 1972." See Appendix C. [It should be noted that the specified amount did not represent an "allocation" to Mr. Bevan, but, rather, his "allotments" and the income thereon as

specified in the Plan. What is payable to him is "the amount of his contingent allotments" evaluated as per the Plan.]

However, the Trustees thereafter asked the District Court for authorization to *terminate* the Contingent Compensation Plan and to *disaffirm* all obligations thereunder. Later, the trustees modified their proposal by asking for authority to appropriate $6,000,000.00 of the $8,600,000.00 then in the Contingent Compensation Fund directly to the railroad, and to use the remaining $2,600,000.00 as a reserve for payments to certain employees, in accordance with a proposal submitted by the trustees, and subject to the District Court's arbitrary limitation of $50,000.00 annually on any employee's retirement benefit from railroad sources.

Under the trustees' proposal, Mr. Bevan would not receive one dollar of the $539,090.12 valuation then assigned to his allotments in the Fund ($325,815.11 being his salary actually contributed over a period of 18 years; the balance, his share of the earnings on the Fund).

On January 26, 1973, the District Court decreed:

> (a) the assets in the Contingent Compensation Fund are the property of the trustees, free and clear of all legal or equitable claims of Mr. Bevan or any other person who was a participant in the Plan and a contributor to the Fund;
>
> (b) the trustees' "settlement" formula allocating only $2,600,000.00 for payments to certain participants —and not including Mr. Bevan at all—is approved, payment to be made during reorganization "as cash permits."
>
> (c) the District Court's $50,000.00 per annum limitation on any retired employee's payments from "railroad sources" is continued in effect and is to be applied to amounts due from not only the Contingent Compensation Fund but the other pension funds as well, despite the prior vesting of Mr. Bevan's rights thereunder.

The District Court came to these conclusions despite its own statements with respect to the Contingent Compensation Plan:

> (1) the court described the Contingent Compensation Plan as a "complex program under which *part of the salary* of certain executives, *instead of being paid annually in cash, was allotted to them for distribution after retirement*" and "*the amounts thus allotted were transferred to a Contingent Compensation Reserve Fund, for investment*" (emphasis added).
>
> (2) the court agreed that "generally speaking, whenever the union employees of the Debtor obtained wage increases through collective bargaining, non-agreement employees were given salary increases at approximately the same percentages of increases" and "whenever said salary increases became effective, employees participating in the Contingent Compensation Plan received a *part of the increases in cash, and the balance was allotted to them under the Plan*" (emphasis added).
>
> (3) the court said that "it is entirely clear that this was a Plan for deferred compensation, and not a pension program. Unquestionably, participants in the Plan have valid and subsisting contractual claims against the Debtor's estate . . . nor does anyone now contend that the participants have forfeited their rights under the Plan."

The District Court's denial of Mr. Bevan's right to recoup his $325,000.00 in salary withheld over eighteen years (and the income it earned) was based on the idea that somehow the Plan gave the employee rights which the Fund then took away. The court agreed that when the employer held back the employee's salary, the employee had the right to get it back (with the income it earned) as provided in the Plan; but, the court held, once the withheld money was put into the "Fund," it somehow acquired some different, isolated, insulated, unreachable status or charac-

teristic. The District Court said: "*The Contingent Compensation Reserve Fund* which was established in connection with the Plan *stands, however, on an entirely different footing.*"

This tortured divorcement of the Plan, which produced the money, from the Fund, which consisted of that very same money, and which was established to pay that money back to those whose salaries it was, was said to be based on three isolated paragraphs out of the 15-page Plan.

Section 401, stating that the Fund shall not be a trust fund, that the assets therein shall be available at all times for any corporate purpose, and that a participant shall have no right in or to any funds or property which may be held in the Fund, and

Section 1201, stating that no participant shall have any interest in any Fund or in any specific asset or assets of the company by reason of amounts contingently allotted to him, and

Section 1401, the *last* sentence of which provides that no consent of any participant shall be required in connection with the amendment, suspension, or termination of the Contingent Compensation Reserve Fund, which shall remain subject at all times to the unrestricted control of the company.

The District Court did not note that the *first* sentence of Section 1401 provides that *no allotment made to a participant may be taken away from him through an amendment, suspension or termination of the Plan.*

Nor did the District Court note that neither Mr. Bevan nor any other participant had claimed any right to the Fund as such or to any specific asset held by the Fund or by the company, but only to payment of their allotments, valued in accordance with the Plan. In this connection, it is significant to note that Section 701 (retirement before age 65) states that in that event "*his* contingent allotments *shall be paid* to him"; and Section 408 (suspension of the Fund) provides that in that event "the contingent allotments of

a participant" shall be evaluated and "*shall be paid* to the participant."

Finally, the District Court did not mention (1) the rather obvious fact that if these Funds were in fact assets of the corporation there would have been no need to state that they could be used for corporate purposes, and (2) that *Section 1001* of the Plan provides that the right of any person to receive any payment under the Plan shall not be subject to alienation, assignment, attachment, execution, garnishment, sequestration, or any legal, equitable or other process, with no exception in favor of either the Debtor or the trustees.

The Court of Appeals for the Third Circuit affirmed the judgment of the District Court on August 21, 1973 and denied Mr. Bevan's timely Petition for Rehearing on October 9, 1973.

In so doing, the Court of Appeals erroneously stated that "the Plan made clear that the Fund was held as part of the company's general assets, subject at all times, to its use and disposition, and subject to the claims of creditors . . ."

Those statements are erroneous. No such provisions are included in the Plan. They are found in a "descriptive summary" issued by the company—but that summary does not accurately state the provisions of the Plan in this respect, and *the Plan is the contract between the parties*.

The Plan itself states in Section 401 that these assets "shall be available at all times for any corporate purpose of the company"—and that is all. Obviously, if the assets were in fact *company assets*, there would have been no need to state that they would be available for corporate purposes—of course they would. But the quoted language had to be employed because *all the money came from and belonged to the participants, including Mr. Bevan*. The Plan simply gave the company the right to use whatever assets might not be immediately needed for pay-outs under the Plan—bound to be a considerable amount be-

cause payments became due only upon death or retirement.

However, that provision did not change the nature of the Plan, or its purpose, and it did not *give* the assets to the company, nor relieve the company of the obligation to pay back the participants in accordance with the Plan.

In Mr. Bevan's case, Section 701 entitled him to his money when he retired, prior to age 65, on June 8, 1970—also prior to the initiation of reorganization proceedings. Similarly, when the Board discontinued the Plan as of June 1, 1970, it made his right doubly plain, under Section 408.

The Court of Appeals was also wrong in stating that "the Fund was held as part of the company's general assets . . .". The contrary is established by the stipulations filed in the trial court which disclose the following:

> (a) the corporation was not required to and never did contribute a single dollar to the Fund;
>
> (b) all the securities in the Fund were bought solely with money withheld from the employees' salaries (and the income earned thereon);
>
> (c) the securities in the Fund were never comingled with securities owned by the corporation and all market risks were on the employees;
>
> (d) although the agreement specifically stated that the Fund was to be available for any corporate purpose, *the corporation never claimed the Fund was an asset of the corporation, never attempted to use the Fund for any corporate purposes or for collateral, and never reflected the Fund in its net worth.*

The nature of the whole transaction is reflected in the language of Section 701. It does not state that *an amount equal* to his allotments shall be paid to him, or that he shall have a *claim* for that amount. It says in simple language "*the amount of his contingent allotments shall be paid to him.*" He is to be paid his money which is being held for him in the Fund. It is as simple as that.

The salary increase was allotted to him under the Plan; it was paid into the Fund and invested for him pending his

retirement; he retired, and so "the amount of his contingent allotments shall be paid to him" after evaluation in accordance with the Plan, and within the period stated in the Plan.

There is only *one* Plan—and it provides for the allotments to be *paid into* the Fund, and *repaid out* of the Fund. The Plan provides for creation of the Fund as the source of payment of the allotments upon the contingency of retirement or death. The lower court's approval of the Trustees' attempt to seize the allotments and the income they have earned, amounts to a judicial taking of one person's property for the benefit of another. Not even a bankruptcy court can do that.

Nevertheless, the Court of Appeals held that Mr. Bevan and other participants in the Plan cannot even recover their own money unless they can satisfy the Court that the company holds the money as a trustee. The Court of Appeals ignored the many contrary decisions holding that the claimant need show only that the property or money held by the bankrupt did not belong to the bankrupt and for that reason no title passed to the trustee.

Finally, the Court of Appeals refused to review the District Court's arbitrary $50,000 per annum limitation on the amount that Mr. Bevan or any other retired employee can receive from so-called "railroad related sources".

This action gives unfettered discretion to the district judge to limit the amount any retired employee may receive from *all* sources including vested pension funds, and including this special fund consisting solely of contributions of the employees themselves.

Petitioner asserts, and it has not been denied by the Trustees, that this is the first time in history that vested pension rights have been ignored and repudiated in a railroad reorganization.

Although these errors, and their effect, was pointed out to the Court of Appeals in a timely Petition for Rehearing, that petition was denied on October 9, 1973. This petition was filed within ninety days of that date.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided a substantial question contrary to Section 70a of the Bankruptcy Act and this Court's decision in *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962), with the effect that petitioner's vested rights over $50,000 per year, and his $325,000 in contributions to this Fund, will be turned over to the Trustees. The decision cannot be dismissed as simply an erroneous interpretation of a contract and an ordinary exercise of judicial discretion. Indeed, that view of the case led the lower courts into ignoring fundamental principles of bankruptcy law and a clearly applicable recent decision of this Court. This attempt to seize other people's property and turn it over to the Trustees raises a basic question of bankruptcy law which should be reviewed by this Court in the light of its decisions in the *Pearlman* case and in prior cases cited herein.

The Court of Appeals' ruling is in direct conflict with the doctrine laid down by this court in *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135-36 (1962):

> Property interests in a fund not owned by a bankrupt *at the time of adjudication*, whether complete or partial, legal or equitable, mortgages, liens or simple priority of rights, are of course not a part of the bankrupt's property and do not vest in the trustee. The Bankruptcy Act simply does not authorize a trustee *to distribute other people's property among a bankrupt's creditors*. (Emphasis supplied.)

This is a well-settled doctrine under bankruptcy law. *See Gorman v. Littlefield*, 229 U.S. 19 (1913); *Sexton v. Kessler & Co.*, 225 U.S. 90, 98 (1912).

Moreover, the Court of Appeals' decision violates the express mandate of Section 70a(5) of the Bankruptcy Act, 11 U.S.C. §110a(5) (1970), which precludes the vesting of title in the trustee of the amounts contributed to the fund

by petitioner and owing to him *as of the date of the filing of the reorganization petition.*

All the authorities agree on this point: 4A *Collier on Bankruptcy* ¶70.15(2) at 137 (14th ed. 1971); 3 *Remington on Bankruptcy* §1178 at 9-11 (1957); 1 *Loveland on Bankruptcy*, §377 at 779 (4th ed. 1912).

Even *McKey v. Paradise*, 299 U.S. 119 (1936), in which this Court held against the employees, sustains the petitioner's view. In *McKey*, there was an agreement whereby the employer undertook to make specified deductions from the wages of its employees as they accrued and to pay over the amounts deducted to a welfare association. This Court, in that case, held that no resulting trust was created, but simply a creditor-debtor relationship, because it did not "appear that it was contemplated that the bankrupt should accumulate or hold any fund. . . . At no time throughout the whole period was there a trust fund or *res*. No fund was segregated or set up by special deposit or in any manner . . ." 299 U.S. at 122. The exact opposite is true in this case.

The fundamental rule obtaining in bankruptcy law is that if the property does not belong to the bankrupt, the trustee has no right to it and must surrender it to the rightful owners. *See, e.g., Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962); *Gorman v. Littlefield*, 229 U.S. 19 (1913); *Sexton v. Kessler*, 225 U.S. 90 (1912); and *In re Universal Medical Services, Inc.*, 460 F.2d 524 (3rd Cir. 1972); *In re Metropolitan Offset Printers, Inc.*, 391 F.2d 770 (3rd Cir. 1968) decided by this same Court of Appeals, and numerous other cases cited in the margin.[1]

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1. *Denco Dev. Co. v. Community Sav. & Loan Ass'n*, 376 F.2d 548 (9th Cir. 1967); *Elliott v. Bumb*, 356 F.2d 749 (9th Cir. 1966); *Fowler v. Pennsylvania Tire Co.*, 326 F.2d 526 (5th Cir. 1964); *San Diego Wholesale Credit Men's Ass'n v. Garner*, 325 F.2d 862 (9th Cir. 1964); *Palmer v. Travelers Ins. Co.*, 319 F.2d 296 (5th Cir. 1963); *Gulf Petroleum, S.A. v. Collazo*, 316 F.2d 257 (1st Cir. 1963); *American Serv. Co. v. Henderson*, 120 F.2d 525 (4th Cir.

As has been pointed out in the Statement of the Case, the Court of Appeals erred in referring to the Fund here involved as being "corporate assets" and "general assets" of the Railroad. This Fund was made up entirely of payments deducted from the employees' compensation. The very fact that the Plan specified that the funds should "be available for any corporate purpose" demonstrates that they were *not* corporate assets. If they were, no such language would have been necessary. The phrase had to be employed, however, because not one dollar of this Fund came from the employer. The Fund was and remained the property of the participants who contributed to it.

In its entirety, the Plan created a method whereby the salary allotments were first set aside, then invested, and then paid back to the employees as they retired or died. This was and is the whole purpose of the entire exercise. If there is any ambiguity in the Plan drafted by the railroad, familiar principles of Pennsylvania law require that it be resolved against the drafter. And this is especially true where the subject matter is retirement pay. *Forrish v. Kennedy*, 377 Pa. 370, 376 (1954); *Diskin v. Philadelphia Police Pension Fund Ass'n*, 367 Pa. 273, 278 (1951); *Levitt v. Billy Penn Corp.*, 219 Pa. Superior Ct. 499, 505 (1971); *Siegel v. First Pennsylvania Banking & Trust Co.*, 201 F. Supp. 664 (D.C.E.D. Pa. 1961).

Moreover, it has long been the law in Pennsylvania that language will not be construed to require a forfeiture unless no other construction is possible. *See, e.g., Hild v. Dunn*, 310 Pa. 289 (1933); *Baldwin v. American Motor Sales Co.*, 309 Pa. 275 (1932).

In this case, the language of the Plan is clear, the intent of the parties is clear, the eighteen year interpreta-

1941); *Todd v. Pettit*, 108 F.2d 139 (5th Cir. 1939); *Frederick v. Baxter Arms Corp.*, 107 F.2d 732 (2d Cir. 1939); *In re Prudence Bonds Corp.*, 79 F.2d 212 (2d Cir. 1935); *Cattle Owners Corp. v. Arkin*, 252 F. Supp. 34 (S.D. Iowa 1966); *In re German*, 193 F. Supp. 948 (S.D.Ill. 1961); *In re Prager*, 173 F. Supp. 859 (D.N.H. 1958); *In re Simon*, 167 F. Supp. 214 (E.D.N.Y. 1958); 1 *Loveland on Bankruptcy*, §404 at 830-34 (4th ed. 1912).

tion and application of the Plan is eloquently clear[2] and the result sought by the trustees is contrary to all three.

Petitioner submits that this Court should review this decision which ignores the principles set out in *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962), as well as the Bankruptcy Act and numerous decisions applying that Statute. This is especially true where, as here, the result is to abrogate substantial vested rights under the railroad's regular pension plans, and to confiscate substantial sums contributed by employees ($325,000 by this petitioner alone) under another plan drafted by the employer and which was never intended to make such a result possible.

2. The Court of Appeals has refused to review and has therefore approved the exercise of unfettered discretion by the District Court in arbitrarily limiting the amount a retired employee may receive from all "railroad related" sources, including vested pension rights, and petitioner's own money ($325,000) entrusted to the Railroad and required to be repaid in accordance with the Contingent Compensation Plan. The question whether a bankruptcy court can lawfully be given such unfettered discretion with respect to property not owned by the bankrupt has not been but should be decided by this Court. This novel idea that vested pension rights and other property rights can arbitrarily be swept away by an unreviewed (and, under this decision, apparently unreviewable) decree of a district judge should not become law without having been reviewed by this Court.

The Court of Appeals devoted only a single paragraph of its opinion to the trial court's wholly subjective and arbitrary $50,000 per year ceiling on payments to Mr. Bevan and others from "sources related to the Debtor".

2. It has been well said that, in the last analysis, "the controlling evidence is found in the way the money was actually handled over a long period of years." *Equitable Life Assur. Soc. of the United States v. Stewart*, 12 F. Supp. 186, 191 (D.C.W.D., S.C. 1935). This is so because "a person's construction of his own language constitutes the highest evidence of his intentions." *Fowler v. Pennsylvania Tire Company*, 326 F.2d 526, 532 (5th Cir. 1964).

This ruling reflected the trial judge's completely gratuitous and unsupported assumption that these individuals had reached their higher-paying positions as the result of "pre-bankruptcy salary policies which are most clearly vulnerable to criticism." The ruling is not based on any cited law, precedent or evidence. It is based on and reflects only the trial judge's thinly-veiled resentment of anyone earning more than $50,000 per year. Judicial action based on such a factor is plainly improper; nevertheless, it was summarily affirmed by the Court of Appeals. "A Government of laws and not of men" should not be abandoned because of some judge's preconceived idea of unwarranted opulence. The incongruity in this situation is that the Trustees have retained one Moore as President of the Railroad and that, at age 65, after approximately eight years of service, Mr. Moore will be entitled to pensions totalling *$93,000 per year.*

From Mr. Bevan's standpoint, the result of the decision below is both shocking and devastating. What it means is that the trial court has the right, without citing any authority and without any evidentiary hearing, to literally pull a limitation figure out of the air and thereby deprive Mr. Bevan of $27,000 per year in vested pension payments as well as $325,000 of his own money (and the earnings thereon) contributed under the Contingent Compensation Plan.

Even if it be conceded—solely for the purpose of argument—that a bankruptcy court may have some such power with respect to *unvested rights in funds originating with the bankrupt estate*, there is no possible legal or equitable basis for applying such a limitation to vested rights and to the money with which the employees built up this special fund.

With respect to the limitation placed on Mr. Bevan's vested rights, totalling approximately $77,000 per year, no precedent could be cited by the lower courts. Petitioner has asserted, and it has not been denied by the Trustees, that this is the first time in the long history of railroad

reorganizations that vested pension rights have not been recognized in full. The legal and equitable bases for this rule have been well set out in the classic case of *Bowen v. Hockley*, 71 F.2d 871 (4th Cir. 1934). That precedent has been universally and consistently followed by all courts.[3] The departure from this important rule of bankruptcy law by the courts below in this case is in itself a sound reason for this Court to review this case.

With respect to the Contingent Compensation Fund, those rights also vested. Moreover, there is nothing in the bankruptcy law permitting a court to force former employees of the bankrupt to support the bankrupt estate with their personal assets. Indeed, the contrary principle has been well stated in *American Brake Shoe & F.C. v. New York Rys. Co.*, 278 F. 842, 843 (S.D.N.Y. 1922) that "It is the duty of the receiver to make every proper effort to increase the assets of an estate, *but not at the expense of fundamental principles of fair dealing*." (emphasis added). See also *In re Overseas National Airways, Inc.*, 238 F. Supp. 359 (E.D.N.Y. 1965).

There is no trace of fair dealing in the instant proposition. Indeed, how can any fair person now tell Mr. Bevan that he is to receive nothing—zero—from this self-created fund when he was told, in writing, on October 6, 1970, by the Trustees' counsel, that his share in the Plan was then "valued at $566,333.26, which, subject to the terms of the Plan, is payable to him in ten (10) annual installments commencing March 15, 1972." See Appendix "C" to this petition.

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3. The case of *Alpert v. New York, N. H. & H. R. R.*, 348 F.2d 304 (C.A. 2, 1965), has no relevance here. There, the Court of Appeals for the Second Circuit rejected a *special* contract which Alpert had exacted from the railroad, purporting to give him a right to deferred compensation of $25,000 per year for twelve years after only five years of service. The contract applied only to Alpert and had no relation to any regular pension plan such as those here involved. Where such plans exist, vested rights have always been honored, and even the Court of Appeals in this case so noted.

The shocking overall effect of the trial judge's order can best be appreciated by listing the items of Mr. Bevan's property which it confiscates:

> (a) 1/12 of the difference between $50,000.00 and approximately $77,000.00 vested rights in railroad-related funds has been and is being lost each month by Mr. Bevan; this approximates $2,200.00 per month; and
>
> (b) the first two of the ten installments of at least $32,500.00 ($56,600.00 per trustees' counsel's letter of October 6, 1970) due to Mr. Bevan from the Contingent Compensation Fund has been withheld and the others will be withheld.

These substantial losses due to the confiscatory decree of the trial court grow each month and each year with the approval of that court and the Court of Appeals. This Court, therefore, represents Mr. Bevan's only hope of recovering his own $325,000, plus the other vested payments to which he is entitled.

The trial court could not cite any precedent for its action in establishing this limitation which it knew would affect only six individuals at the most. This is because courts have uniformly applied the rule that all claims of a particular class must be treated in the same manner. *In re Lambertville Rubber Co.*, 27 F. Supp. 897 (1939), *modified on other grounds but affirmed on point here stated*, 111 F.2d 45 (3rd Cir. 1940); *State of Missouri v. Earhart*, 111 F.2d 992 (8th Cir. 1940), *cert. den.*, 311 U.S. 676 (1940). And this Court of Appeals itself has held that a court cannot establish priorities within a group. *In re Columbia Ribbon Co.*, 117 F.2d 999 (3rd Cir. 1941); *In re Delaware Hosiery Mills, Inc.*, 202 F.2d 951 (3rd Cir. 1953).

Moreover, the trial court originally established the $50,000 limitation on a temporary basis, until such time as the Trustees could review the matter in the light of the entire situation. The record is barren of any evidence of

any such review, and the Court of Appeals summarily refused to "second-guess his well-considered judgment."

Petitioner submits that the Court of Appeals' refusal to even review the basis for the District Court's appropriation of all payments due to Petitioner in excess of $50,000 per year not only affirms an arbitrary, unconstitutional confiscation of Petitioner's property, but represents such a departure from accepted legal and judicial principles as to require the exercise of this Court's supervisory power over the lower federal courts.

CONCLUSION

For all the reasons set forth herein, this Petition for Certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1081, 73-1098, 73-1204, 73-1205, 73-1206, 73-1207 and 73-1208

In the Matter of: PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

TWENTY-ONE RETIRED EMPLOYEES,
Appellants in No. 73-1081,

DAVID C. BEVAN, *Appellant in No. 73-1098,*

ALFRED E. PERLMAN, *Appellant in No. 73-1204,*

STUART T. SAUNDERS, *Appellant in No. 73-1205,*

ARTHUR E. BAYLIS, A. M. HARRIS, HENRY W. LARGE, CHRISTY C. MAGRUDER, HERBERT M. PHILLIPS, GEORGE C. VAUGHAN, CAROL JEAN COLE, Executrix of Estate of JAMES B. GRAY, six retired employees and the estate of one retired employee of debtor,
Appellants in No. 73-1206,

ARTHUR J. GREENOUGH,
Appellant in Nos. 73-1207 and 73-1208.

(Bankruptcy No. 70-347)

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued May 14, 1973

Before: Van Dusen, Gibbons and Rosenn, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 21, 1973)

GIBBONS, *Circuit Judge*.

We here consider consolidated appeals from two orders, Nos. 1087 and 1088 of the Penn Central reorganization court, which deal with the continuation of payments to former Penn Central executives pursuant to several retirement programs. The district court's opinion on these orders is reported. *In the Matter of Penn Central Transportation Company, Debtor*, 354 F. Supp. 408 (E.D. Pa. 1973). Twenty-eight retired Penn Central employees have appealed. The appeals present as issues:

(1) common to all appellants, the propriety of the district court's conclusion that assets held in Penn Central's Contingent Compensation Plan (CCP) became, on the filing of the petition for reorganization, property of the trustees in reorganization, leaving appellants as creditors holding unsecured claims for deferred compensation;

(2) common to six appellants,[1] the propriety of the district court's ruling that the reorganization court would continue payments under the Contingent Compensation Plan as expenses of operation of the reorganization, but with a limitation that total pension payments from the Penn Central Plan for Supplemental Pensions[2] and Penn Central unfunded retirement programs,[3] including the Con-

1. Symes, Greenough, Bevan, Saunders, Smucker and Perlman.

2. The Plan for Supplemental Pensions is a funded retirement plan. Order No. 278 held that the trustees had no interest in the fund. Order No. 1087 authorizes the trustees to continue the Plan in existence, making the necessary employer contributions. There is no appeal from this feature of Order No. 1087.

3. These include two supplementary benefit arrangements of the New York Central, and the New Haven pension plan which

tingent Compensation Plan, would not exceed $50,000 a year to any former employee; and

(3) in the case of Symes, the application of the $50,000-a-year limitation not only to his claim under the Contingent Compensation Plan, but also to his claim under a $10,000-a-year special pension awarded to him by the Penn Central Board of Directors on October 23, 1968. Mr. Symes' case will be dealt with separately hereinafter.

The Contingent Compensation Plan was established by the Board of Directors of the former Pennsylvania Railroad in 1952, was continued after the 1968 merger with New York Central, and was amended, unilaterally, by the Board of Directors from time to time thereafter. When cash salary increases were granted to union employees or to non-union employees not included in the CCP, the qualifying participants were awarded comparable adjustments in compensation, but not in cash. Qualifying participants included employees earning $30,000 or more a year. In its preamble the CCP contains this general description:

> "As more fully described below, the Board of Directors, from time to time, may allot to any employe an amount representing contingent compensation subject to the terms and conditions set forth herein. At the discretion of the Board an amount equivalent to such allotment, or any part thereof, may be transferred to a reserve fund and invested; and to the extent of such transfer, the payments to a participant shall be measured by the value of the reserve fund. However, the assets held in the reserve fund will at all times be available for any corporate purpose.

Penn Central assumed in the 1968 merger, an Interim or Early Retirement Plan designed to encourage attrition of the labor force, and additional pension benefits for prior service at other railroads. Order No. 1087 authorizes the trustees to continue these plans in effect and to make all payments necessary to implement them. There is no appeal from this feature of Order No. 1087.

> After retirement the compensation contingently allotted to a qualifying employe will be paid to him in installments, subject to certain conditions. In the event of death, before or after retirement, payments will be made to the employe's beneficiary."

During the life of the CCP 164 employees were designated by a committee of the Board of Directors as qualifying participants. From 1952, when it was adopted, until June 21, 1970, when by Board action it was terminated, salary increases to the qualifying participants were made in the form of allotments to the CCP. The plan provided for periodic transfer of the allotments to a reserve fund for investment. The extent of such transfer payments to a participant would be measured by the value of the reserve fund. The participants' allotment units would be paid out after his retirement in annual installments, the amount of an installment being determined by reference to the value of his allotment units on the valuation date preceding the date of payment. The CCP contained forfeiture provisions applicable both before and after retirement. With respect to the reserve fund the CCP provided in relevant parts:

> "Section 401. The Board may authorize the establishment at any time of a Contingent Compensation Reserve Fund, hereinafter called the Fund. The Fund shall not be a trust fund and the assets therein shall be available at all times for any corporate purpose of the Company. A participant shall have no right in or to any funds or property which may be held in the Fund.
>
> Section 1201. No participant nor any other person shall have any interest in any fund or in any specific asset or assets of the Company by reason of amounts contingently allotted to him, nor any right to receive any distribution under the Plan except as and to the extent expressly provided in the Plan. . . .

> Section 1401. . . . No consent of any participant shall be required, however, in connection with any amendment, suspension or termination of the Contingent Compensation Reserve Fund, which shall remain subject at all times to the unrestricted control of the Company."

From time to time Penn Central distributed to qualifying employees descriptive summaries of the CCP. Typical of the relevant language of such summaries is the description from the one dated October 11, 1969:

> "Either the contingent allotments or the Fund may be discontinued at any time at the discretion of the Board, however, in either instance employes' rights remain whole for the period prior to such termination date.
>
> The assets of the Contingent Compensation Reserve Fund remain assets of the Penn Central Transportation Company and subject to the rights of all creditors of the Company. No participant has any right to receive payments at any other times or in any other amounts than as provided by the Plan."

When, shortly before the filing of the petition for reorganization, the Penn Central directors terminated the CCP, the Contingent Compensation Reserve Fund contained in excess of $8.6 million. Of this sum, a substantial amount represented appreciation in the fund investments over the initial allotments made on account of the participants' services. Further appreciation took place after the filing of the petition for reorganization, so that when the district court made the rulings appealed from the Fund was valued at over $10 million.

Originally the trustees petitioned the reorganization court for authorization to disaffirm all obligations under the CCP and to expend the entire Contingent Compensation Reserve Fund for general railroad purposes. Thereafter, recognizing that such a result could adversely affect the

morale of those qualifying participants who were still employed by the railroad, the trustees filed a revised petition seeking approval of a proposed settlement with the CCP claimants. Under this proposed settlement, $2.6 million of the Fund balance would be placed in a reserve fund managed by an independent financial advisor and would be distributed to the participants in proportion to their allotment units, but with the value fixed at the amounts actually allotted but not yet received, or at the value of the pro rata shares of the Fund as of December 31, 1970, whichever was less, and all subject to a $50,000 limitation per person per year. The proposed settlement had other features which need not be alluded to because for a number of reasons the offer was withdrawn, and the matter proceeded to hearing on a revised trustees' proposal. That proposal was to liquidate the entire Fund, to use the entire Fund for operating expenses, but to pay the participants, as an administration expense, as cash permitted, the amounts proposed in the earlier settlement proposal. The trustees contemplated that such an undertaking by them would be conditioned upon the relinquishment by the participants of any rights to receive payments beyond their actual allotments (or their share in the Fund valued as of December 31, 1970, if that was lower).

The district court did not go so far as the trustees proposed. The court's conclusions here challenged were:

> "3. Participants in the Contingent Compensation Plan have no legal or equitable interest in or claim to the assets in the Contingent Compensation Reserve Fund. Each participant in the Contingent Compensation Plan has a valid claim for the full amount to which he is entitled under the terms of the Plan, but the Trustees should be authorized and directed to recognize such claims during reorganization only to the extent represented by the formula proposed by the Trustees in settlement (i.e., reimbursement of accrued allotments, or pro rata share of the Fund as of Decem-

ber 31, 1970, whichever was less); and such claims should be paid during reorganization only as cash permits. Unless and until otherwise ordered by this Court, the Trustees should set aside and reserve the sum of $2.6 million in order to meet these payments.

4. During reorganization, the Trustees should make no payments from the estate of the Debtor (whether by reason of unfunded retirement programs, or the Contingent Compensation Plan) where the effect of such payment would be that the aggregate amount received by a retired employee from all sources related to the Debtor (*i.e.*, the Plan for Supplemental Pensions, unfunded retirement programs, and the Contingent Compensation Plan) would exceed $50,000 per annum." 354 F. Supp. at 419.

This disposition of the Fund was implemented by Order No. 1088, and a stay was denied both by the district court and by this court. All but $2.6 million has now been expended for general railroad purposes. While Order No. 1088 provides that this sum be invested as a reserve to meet the payments to participants contemplated by the decision, it also provides:

"Said reserve shall remain the property of the Trustees; establishment and maintenance of said reserve shall not give rise to any legal or equitable interest or claim therein on behalf of any participant."

Summarizing, then, the orders appealed from (1) relegated qualifying participants in the CCP to the status of unsecured creditors, to be dealt with in the plan of reorganization in some as yet undetermined manner, (2) authorized the trustees to treat the participants' claims as in the nature of unfunded pension liabilities and to pay these, in reduced amounts, as current operating expenses, and, (3) set aside from the $10 million Contingent Compensation Reserve Fund $2.6 million as a reserve from which to meet those operating expenses. The reserve was recognized to be a

matter of grace, however, and subject to reconsideration by the reorganization court.

It is common ground between the appellants and the trustee-appellees that in a railroad reorganization, some payment on account of unfunded pension liabilities by the trustees are properly treated as necessary and usual operating expenses and as a cost of doing business. In *Tate v. New York, New Haven & Hartford R.R.*, 332 F.2d 449 (2d Cir. 1964), the Second Circuit justified such payments as necessary to preserve the morale of present and future employees. In *Bowen v. Hockley*, 71 F.2d 781, 785-86 (4th Cir. 1934), the practice was justified on the ground that the pensioners' past services helped to create and preserve the estate being administered. Apparently payment of unfunded pension liabilities during a railroad reorganization is a recognized tradition in the industry. *See* Myers, *Financial Impact of Pension Costs on the Railroad Industry*, 7 Lab. L.J. 265, 266 (1956). *Compare In re Compania De Los Ferrocarriles De Puerto Rico*, 76 F. Supp. 521 (D.P.R. 1948). *Cf. Alpert v. New York, New Haven & Hartford R.R.*, 348 F.2d 304 (2d Cir. 1965) (distinguishing deferred compensation contracts from pensions). This court has not explicitly ruled on the practice. Since no party to this appeal challenges it, we accept it, for present purposes, as a governing rule. Nor do we reach in this case any issue as to the ultimate priority, if any, to which the CCP claimants may be entitled in a reorganization plan. This appeal deals only with the district court's rejection of appellants' contentions as to their present rights in the Contingent Compensation Reserve Fund. These contentions are:

> (1) that the CCP should be regarded as a funded rather than as an unfunded pension plan, (or as the trustees prefer, deferred compensation plan) and that the trustees have no interest in the Fund;
>
> (2) that at least as to those participants who retired prior to termination of the CCP, their claims should be treated as vested and secured;

(3) that the reduction in benefits resulting from the refusal of the court to give effect to appreciation in the Fund beyond the original allotments is inconsistent with the practice, referred to above, of recognizing pension liabilities during a railroad reorganization; and

(4) that the $50,000 per annum ceiling on pension payments during reorganization is discriminatory and improper.

In support of their contention that the CCP should be regarded as a funded rather than an unfunded pension plan, appellants argue that the Contingent Compensation Reserve Fund was a trust; express, constructive, or resulting. The Plan provisions quoted above, the Plan as a whole, and all the documents in the record referring to it negate any intention on the part of the Pennsylvania or Penn Central Directors to create an express trust. *See* Restatement (Second) of Trusts §2 (1959). Since there was neither an express trust which failed nor a transfer of property paid for by another, there could be no resulting trust. Restatement (Second) of Trusts, Chapter 12 (1959). Had the Fund, while held by Penn Central, been held in a trust capacity, there would be room for argument that the reorganization trustees became constructive trustees. Restatement of Restitution §160 (1937). But where, as here, the Plan made clear that the Fund was held as a part of the company's general assets, subject at all times to its use and disposition, and subject to the claims of its creditors, there is no basis from which a constructive trust could be implied. The CCP was, as the district court found, nothing more than an executory contract calling for compensation after retirement.

Nor can any distinction be made between those participants retired prior to termination of the CCP and those still employed thereafter. The Plan itself makes no such distinction. Even the amount to be paid remains uncertain until the valuation date immediately prior to the payment. Moreover, the benefits remain forfeitable even after retire-

ment if the retiree does not refrain from activities adversely affecting the company's best interests. *Compare* the Plan *with Retirement Board v. McGovern*, 316 Pa. 161, 174 A. 400 (1934). But in any event, appellants' argument that their rights "vested" upon retirement is entirely beside the point. Their rights may well be "vested"; they are nevertheless unsecured. The issue remains: how should "vested" executory contract pension rights be treated during a railroad reorganization.

Accepting, as have the parties, the general principle that some payments of unfunded pension liabilities are a practical necessity if a railroad is to be successfully operated in reorganization, it does not follow that in applying the principle the reorganization court must enforce each executory pension contract exactly in accordance with its terms. We are dealing with the powers of a court of equity to deal practically with the ongoing problems of employee morale, retention and recruitment. Even looked upon as an equitable recognition of the contributions made to the creation and preservation of the estate, the practice does not necessitate confining the court to the straight jacket of the underlying contract. Indeed, one can envisage a situation where recognizing the exact terms of an unfunded pension contract might both have an adverse effect upon morale of present and future employees and be inconsistent with any contribution made to the debtor's estate. Accepting the principle of some payment of unfunded pension liabilities, no more is required than a responsible exercise of equitable discretion. We find no abuse of discretion in Order No. 1087.

What we have said about the court's equitable discretion with respect to the treatment of payments based upon appreciation in the Contingent Compensation Reserve Fund applies as well to the $50,000-a-year limit. The district court found as a fact that this level of pension would afford each of the participants a decent living standard. We will not second guess his well-considered judgment that no more was appropriate during the pendency of the reorganization.

Finally, there is the separate contention of appellant Symes that the court erred in refusing to continue payment, during reorganization, of a special pension of $10,000 a year voted by the Board of Directors on October 23, 1968. Order No. 1087 makes no final disposition of Mr. Symes' claim on this special arrangement, but it is subject to the overall limitation of $50,000 a year, and Mr. Symes' pensions from other Penn Central sources exceed this amount. For purposes of payment during reorganization, nothing distinguishes the October 23, 1968 unfunded pension contract from the other unfunded pension contracts dealt with in Order No. 1087.

We emphasize that because the parties agree that some payments on unfunded pension liabilities during a railroad reorganization are at least proper, this opinion has not dealt definitively with questions of the extent of or the limitations upon the reorganization court's power in this respect. We also emphasize that the orders appealed from do not determine how the appellants' claims should be dealt with in a plan of reorganization or a liquidation.

Orders No. 1087 and 1088 will be affirmed.

VAN DUSEN, *Circuit Judge*, dissenting in part:

I respectfully dissent only insofar as the majority opinion fails to grant to James M. Symes any part of the $10,000. per year special pension granted on October 23, 1968, after over 50 years[1] of exceedingly valuable service to the Pennsylvania Railroad. The record, including the Appendix, submitted with respect to this special pension, establishes that the principles of equity and fairness require the payment

1. 47 years and 3 months of continuous active service and approximately 6 additional years as a director prior to his retirement.

of all or part of this pension to him for the reasons stated in part II of the brief filed on his behalf concerning this special pension. I would vacate that portion of paragraph 5 of Order 1087 which denies completely this pension and remand with directions that the $10,000. per year special pension be paid to Mr. Symes for the period since June 21, 1970.

In all other respects, I concur in the majority opinion.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Proceedings for the Reorganization of a Railroad

Bky. No. 70-347

In the Matter of
PENN CENTRAL TRANSPORTATION
COMPANY, *Debtor*

MEMORANDUM AND ORDER NO. 1087

(*Re:* Retirement Programs—
Contingent Compensation)

FULLAM, *J.* January 26, 1973

By virtue of various applications and responses thereto, all of which will be detailed later, the Court is required to make comprehensive rulings governing the status of various retirement programs and related programs of the Debtor. A brief description of the programs in question is set forth below; the actual application of each program to particular employees may vary depending upon hiring date and previous employment history:

1. *Retirement Programs.* The retirement programs detailed below are designed to complement and supplement employee benefits under the Railroad Retirement Act, 45

U.S.C. §228(a), and for the most part are applicable only to employees not covered by collective bargaining agreements.

(a) *Plan for Supplemental Pensions.* This plan is primarily funded with employee contributions. However, the Debtor makes certain annual contributions to insure the actuarial soundness of the plan. Order No. 278 in these proceedings recognizes that the Debtor had no interest in this fund, which, as of April 30, 1972, amounted to $353,521,624. The Debtor does, however, have the right to terminate the program, in which event the fund would be divided among the participants pro rata.

The only issue now before the Court is whether the plan should be terminated. The Debtor's contributions to the program amount to approximately $2 million per year. The Trustees seek authorization to continue the program in operation.

(b) *Supplementary Benefit Arrangements.* In consequence of the merger between the New York Central and the Pennsylvania Railroad, the Debtor assumed the obligations of two non-contributory plans in effect at the time of the merger: the New York Central supplementary pension plan, and the New Haven pension plan. Under the terms of the respective plans, continuation of the program is optional with the Debtor (NYC ¶¶11 and 12; NH ¶7). The Central plan applies only to those employees who were not entitled to participate in the contributory pension plan of that railroad and who had 20 years' service. The New Haven plan, applicable to "regular salaried supervisors and officials," was the only pension plan of the New Haven.

Forty-seven employees eligible under the Central plan receive a total of about $23,000 annually, approximately $480 per retiree. Three hundred forty-seven former New Haven employees receive a total of $285,000 per year, approximately $825 per retiree. These amounts are gradually diminishing as a result of attrition.

(c) *Interim or Early Retirement Plan.* This program is designed to facilitate the retirement of selected em-

ployees at age 60, rather than at age 65, by assuring total pension benefits equivalent to those which would have been received had retirement been postponed until age 65. Granting of such early retirement is discretionary with the company, but when early retirement has occurred, the company is legally obligated to continue the interim benefits. A similar program, differing somewhat in its mechanics, was inherited from the New York Central in the merger.

For the year 1972, costs to the Debtor under the program amounted to $3,693,000. This cost would decline substantially in future years, unless additional employees are granted early retirement.

Implementation of the early retirement programs produces significant overall economies, making it possible to consolidate certain positions, or to replace highly paid employees with younger, less highly paid substitutes, without the disruptions which would ensue if employees with many years of long and faithful service to the railroad were to be discharged a few years short of retirement. The Trustees estimate that the net savings for the year 1972 amounted to $7.2 million. Projected savings to the year 1980 aggregate some $45 million.

(d) *Additional Pension Benefits*. The Debtor also provides certain additional pension benefits, in two categories: (1) Since 1961, the Debtor has had a policy of crediting prior executive experience with other employers toward the pension entitlements of newly hired executives over 35 years of age earning more than $20,000 annually. The difference between the pension computed with such credit and the pension which would have been paid without such credit is made up from the Debtor's estate. The additional costs under this constructive service policy aggregate approximately $87,000 annually at the present time, and could eventually amount to slightly more than $145,000 annually. The Debtor's constructive service policy follows the universal practice throughout the railroad industry.

(2) Benefits under the Plan for Supplemental Pensions are based upon the employee's average salary over the last five years of employment. Initially, amounts allocated under the Contingent Compensation Plan *(see infra)* were included as salary, for purposes of this computation. However, a 1968 Internal Revenue Service ruling made it necessary to change this policy. Supplement A to the Contingent Compensation Program insures that persons retiring after 1968 will be treated the same as pre-1968 retirees; that is, the Debtor pays the difference between the actual pension benefits and what those benefits would have been if contingent compensation had been included in the computation.

The Trustees propose to continue to carry out all of the foregoing programs.

2. *Contingent Compensation Plan*. This is a complex program under which part of the salary of certain executives, instead of being paid currently in cash, was allotted to them for distribution after retirement. The amounts thus allotted were transferred to a Contingent Compensation Reserve Fund, for investment. This fund now amounts to slightly more than $10 million.

Shortly before the Debtor filed its reorganization petition, the Board of Directors suspended the Contingent Compensation Program, and it remains in suspension to the present date. The details of the program, and the Trustees' proposals with respect to it, will be discussed below.

I. LEGAL PRINCIPLES

Resolution of the conflicting contentions of the parties should begin with recognition of the following general principles:

1. Vested, fully funded contributory pension programs are not affected by the employer's filing for reorganization under §77. The assets in any such pension fund are not

"property of the Debtor." This much appears to be conceded by virtually all of the parties, and, in any event, has been resolved by Order No. 278 in these proceedings.

2. Irrespective of whether a pension plan is funded or unfunded, continuation of pension payments thereunder is generally treated as a necessary and usual operating expense, payable by the Trustees during reorganization as a cost of doing business. Justification for this practice has been found to arise from the fact that the employee's past services helped to create and preserve the estate of the Debtor, *e.g.*, *Bowen v. Hockley, et al.*, 71 F.2d 781 (4th Cir. 1934), or from the necessity of preserving the loyalty and morale of present and future employees, *see: Tate v. New York, New Haven & Hartford R.R.*, 332 F.2d 449 (2d Cir. 1964). However, insofar as current payments are concerned, the Trustees have the power to make adjustments in the amount and manner of payment, so long as this is done on an equitable and non-discriminatory basis. *Tate v. New York, New Haven & Hartford R.R., supra.*

3. Contractual arrangements for deferred compensation, as distinguished from pension programs, may be disaffirmed by the Trustees, and the claims of employees or former employees resulting from such disaffirmance are not entitled to any special priority or acceleration; the claimants are merely general creditors of the Debtor's estate. *Alpert v. New York, New Haven & Hartford R.R.*, 348 F.2d 304 (2d Cir. 1965).

There is thus no difficulty in concluding that the funded pension plan of the Debtor should continue undisturbed, and that the Trustees should continue to make the required contributions. Nor is there any reason for questioning the propriety of the Trustees continuing to carry out the various unfunded pension programs outlined above. These are merely normal operating expenses.

The principal disputes in the present proceeding have to do with the correct treatment of the Debtor's Contingent Compensation Plan, and the legal propriety of imposing a

maximum limitation upon the amount payable to any retiree. These issues will be discussed separately.

II. THE CONTINGENT COMPENSATION PLAN

There are two separate issues, or sets of issues, which must be decided in connection with the Contingent Compensation Program: (1) the status of the Contingent Compensation Fund ("Fund") which was established in connection with this program, and (2) the legal rights of participants in the program (the "Plan"). These issues are, of course, related, in the sense that both the Fund and the Plan must be considered in determining the basic question of whether this is a pension program or some other kind of arrangement; and it is therefore not surprising that the distinctions between the two sets of issues are sometimes obscured in the arguments of counsel. Nevertheless, the distinctions must be kept in mind.

Eligibility for participation in the Plan was limited to salaried employees and officers (except members of the Committee on Organization and Officers' Salaries) designated by the Board of Directors upon recommendation of the Committee. The stated purpose of the Plan was to attract and retain employees in "executive and other key positions." In practice, only persons earning more than $30,000 per year were eligible. A total of 164 employees participated in the Plan (on the date of bankruptcy, the Debtor had more than 92,000 employees, of whom 121 were participants in the Plan).

I agree with counsel for the objecting participants that the express terms of the Plan must be viewed in the light of the manner in which it was implemented. Generally speaking, whenever the union employees of the Debtor obtained wage increases through collective bargaining, non-agreement employees were given salary increases at approximately the same percentage of increase. And whenever such salary increases became effective, employees par-

ticipating in the Contingent Compensation Plan received a part of the increase in cash, and the balance was allotted to them under the Plan. The precise apportionment between cash salary increase and allotment to the Plan was carried out on a sliding scale: for participating employees earning between $30,000 and $39,999 annually, 90% of each increase was paid in cash, and 10% went into the Contingent Compensation Plan. For each $10,000 of salary range, these percentages were shifted by 10%, so that, for employees earning $80,000 or more annually, only 20% of each salary increase was paid in cash, and 80% was allotted to the Plan.

Amounts allotted under the Contingent Compensation Plan were treated as operating expenses of the Debtor, but were not reported as compensation paid to the employees, nor were they then taxable as income to the employees.

The Plan provided that, unless otherwise specified by the Committee, allotments accumulated to the credit of a participant would be paid to him, if living, in 10 equal annual installments commencing after his attainment of age 65; or to his designated beneficiary or his estate, in a lump sum. In no case could payment of the full amount of the accumulated allotment be deferred longer than 10 years and 6 months after his death or, in the case of living participants, 10 years and 6 months after attainment of age 65 or severance from employment, whichever was later.

Under the heading "General Description of the Plan," the Plan specifically states "it will normally provide such individuals with benefits after termination of service *by deferring compensation* until termination of service with the company . . . To achieve this purpose the plan provides *a method of compensating employees*, which differs in several respects from the customary cash payment. . . ." [Emphasis supplied.] From this language, from the Plan as a whole, and from the manner in which the Plan was implemented, it is entirely clear that this was a plan for deferred compensation, and not a pension program. Unquestionably, participants in the Plan have valid and subsisting contractual claims against the Debtor's estate. While there

are provisions in the Plan for forfeiture, no such forfeiture has ever been asserted in the past, nor does anyone now contend that the participants have forfeited their rights under the Plan. Indeed, the Plan provides, in §1401, ". . . no amendment, suspension, or termination [of the plan] may without his written consent, apply to the payment to any participant of any contingent allotment previously made to which he would otherwise be entitled."

The Contingent Compensation Reserve Fund which was established in connection with the Plan stands, however, on an entirely different footing. Section 401 of the Plan provides:

> "Section 401. The Board may authorize the establishment at any time of a contingent compensation reserve fund, hereinafter called the Fund. The Fund shall not be a trust fund and the assets therein shall be available at all times for any corporate purpose of the company. A participant shall have no right in or to any funds or property which may be held in the Fund."

And in §1201:

> "Section 1201. No participant nor any other person shall have any interest in any fund or in any specific asset or assets of the company by reason of amounts contingently allotted to him. . . ."

And, finally, in §1401:

> "Section 1401. . . . No consent of any participant shall be required, however, in connection with any amendment, suspension or termination of the contingent compensation reserve fund, which shall remain subject at all times to the unrestricted control of the company."

The Board of Directors did set up the Fund, as authorized, but not required, by the Plan. It is apparent that this step was taken in order to achieve two basic objectives:

(1) to establish a reserve against the company's contingent liabilities under the Plan; and (2) to provide a mechanism for investing the reserve, and for enabling the participants to obtain the benefits resulting from such investment. Whenever a participant fulfilled all of the requirements of the Plan (*i.e.*, retired and was at least 65 years of age, or died) the total amount payable to him was determined by adding his accumulated allotments which had never been invested in the Fund, to the value represented by his proportionate share of the Fund. In theory, the participants were at risk; if the Fund's investments decreased in value, the participants' deferred compensation might be less than had been allotted to them over the years. As a practical matter, however, the Committee was in a position to terminate the Fund at any time, and presumably would have done so if faced with any genuine prospect of erosion. Actually, the Fund increased in value over the years; but for the intervention of bankruptcy, the deferred compensation which would have been paid to the participants would in most cases have substantially exceeded the amounts originally allotted.

In view of the provisions of the Plan quoted above, the conclusion is inescapable that the participants have no claim whatever to the reserve Fund as such. The assets of the Fund were "property of the Debtor" on the date of bankruptcy, and are now vested in the Trustees. The objectors nevertheless argue that, in the hands of the Trustees, the assets of the Fund are impressed with a trust, or should be so treated on the basis of equitable considerations. In support of this argument, a number of factors are stressed.

(a) The assets of the Fund were always segregated (but the uninvested contingent allotments were commingled with the general assets of the Debtor for brief periods).

(b) From a balance sheet standpoint, the assets of the Fund, and uninvested contingent allotments, did not contribute to the Debtor's net worth (balancing debits and credits were shown). From this, the objectors contend that no creditor of the Debtor ever relied upon the Fund in ex-

tending credit. But this somewhat overstates the case. A creditor who examined the documents establishing the Plan and the Fund would have learned that the Fund assets were unencumbered assets of the Debtor. For present purposes, whether creditors made such inquiry and actually relied upon these assets in extending credit is not necessarily controlling.

(c) At no time, even in the cash crisis which immediately preceded bankruptcy, did the Debtor see fit to use the Fund for corporate purposes, or to borrow against it. While this can be interpreted as showing that the Debtor's managers considered that these assets were held in trust, it may simply provide some insight into their sense of priorities. Moreover, the action of the Board of Directors, purportedly taken on June 20, 1970 (the day before bankruptcy) terminating all further contingent allotments, and directing that the participants' full salaries should thereafter be paid in cash, is persuasive evidence that all concerned understood the vulnerability of the arrangement in the event of bankruptcy.

The objectors further point out that many of the participants have made commitments, in such matters as estate planning and scale of living, in reliance upon anticipated receipt of contingent compensation pursuant to the Plan. This is undoubtedly a valid consideration. It establishes that the participants, like so many others, relied upon the financial soundness of the Debtor. It provides unnecessary further support for the proposition that the participants have valid claims against the Debtor's estate. But this factor must be balanced against countervailing equities in determining the extent to which these claims should be satisfied on a current basis during reorganization, rather than in the reorganization plan.

Originally, the Trustees sought authorization to terminate the Contingent Compensation Plan and disaffirm all obligations thereunder (Document No. 740), thus making the entire fund immediately available for general railroad purposes. Thereafter, recognizing the desirability of im-

proving morale among the present employees, and after extensive negotiations, the Trustees modified their proposal. In their "revised petition . . . concerning Penn Central Transportation retirement programs" (Document No. 1793), the trustees requested leave to continue these programs in effect; and in their "petition . . . for authority to settle claims under the contingent compensation plan" (Document No. 1794), the Trustees sought approval of an agreement embodying the following features: Of the approximately $8.6 million in the Fund as of December 31, 1970, the Trustees would remove approximately $6 million for general railroad purposes, and the balance of $2.6 million would be placed in a reserve fund managed by an independent financial advisor and distributed to the participants according to the terms of the Plan. The proposed allocation of the Fund is calculated to restore to the participants the amounts which they had actually been allotted and had not yet received, or their pro rata share of the Fund as of December 31, 1970, whichever was less (subject, in certain cases, to the $50,000 limitation hereinafter discussed). The participants would not benefit in the growth of the Fund since December 31, 1970. Of the 121 participants in the Plan as of June 21, 1970, 81 agreed to the Trustees' proposal, 33 objected, and 7 expressed no view.

For a variety of reasons, the Trustees' petitions were not immediately acted upon by this Court. The trustees' proposal has now, in effect, been withdrawn, and a further modification thereof substituted. In the meantime, the Fund has increased to approximately $10 million.

The Trustees' present proposal arises by reason of the prospect of a short-range cash emergency. The Trustees now propose to liquidate all of the assets in the Fund, and use the entire sum for current operating expenses, but to undertake, as an administrative obligation, to pay to participants, as cash permits, the same amounts contemplated by the earlier agreement. A further hearing to consider this proposal was held on January 10, 1973, but the line-up of objectors and proponents remains substantially unchanged.

Certain indenture trustees who endorse the legal position taken by the Trustees of the debtor vis-a-vis the participants, pressed further objections to the Trustees' proposed use of the Fund.

Under the Trustees' proposal, the participants would relinquish all claims against the Debtor's estate and the Trustees, except their right to receive amounts equivalent to the unpaid balance of their contingent allotments (or their share of the Fund, valued as of December 31, 1970). I believe this over-simplifies the issue, and arguably, cannot lawfully be imposed upon the participants without their consent. While it is true that the participants have no claim to the Fund itself, it is clear that the amounts of their claims under the Plan are to be measured by their pro rata share of the value of the assets in the Fund. The fact that the Committee could lawfully have refrained from investing any of the contingent allotments does not alter the plain language of the Plan, to the effect that fluctuations in the value of the Fund investments are to be reflected by equivalent changes (here, increases in most cases) in the participants' respective entitlements under the Plan. (Recognition of the validity of this analysis may be implicit in the inclusion of a "most favored nation" clause in the Trustees' proposed agreement; this would purportedly assure settling participants' further payments if the non-settling participants ultimately should fare better than the agreement contemplates.)

Thus, the narrow issue presented is whether, recognizing that all participants have valid lawful claims to the full amount provided for them under the Plan, it would be a proper exercise of discretion to permit present recognition and payment of a portion of each such claim during reorganization, while requiring such claimants to await the adoption of a plan of reorganization before determining the correct treatment of the balance of their claims; and whether the basis on which the Trustees propose to grant such partial recognition is a fair and equitable one.

Since I am satisfied that, strictly speaking, the Trustees would have the right to defer the obligations created

by the Contingent Compensation Plan in their entirety, leaving all participants to the proof of claims program, I am satisfied that the participants would have no just cause for complaint if a part of their claims should now be recognized and paid, so long as substantially equal treatment is afforded them. And since I am also persuaded that efficient operation of the railroad requires that employee morale be maintained at a high level, and that capable employees be encouraged to continue in the employ of the railroad, I am likewise satsified that no creditor or other interest can validly object to the Trustees' proposal to assume the obligation of restoring to the participants the balance of their own 'contributions' under the Plan.

It is correct, as the opponents argue, that under the Trustees' proposal, present employees of the Debtor would receive proportionately larger payments during reorganization (*i.e.*, proportionate to the amounts of their total claims) than would retired participants. This is due to the fact that pre-reorganization payments to retired employees were measured by the full amount of each participant's entitlement; stated otherwise, the retired participants have already received payments which recognized the impact of increased values in the Fund. By the same token, however, the total dollars received by retired participants (in advance of the implementation of a plan of reorganization) will be greater than the amount received by present employees. This, of course, is as it should be, since the retired employees made 'contributions' over a longer period, and in greater amounts, than the present employees.

On balance, I see no inequity in charging amounts which participants have already received from the Contingent Compensation Plan against the amounts which the Trustees will be required to pay in the course of the reorganization.

A further factor bears mention. It is apparent that the Contingent Compensation Plan was carefully drawn with a view toward possible tax consequences. As a general proposition, under the "constructive receipt" doctrine, to

the extent that an employee had a non-forfeitable interest in the allotments, the allotments would have been includible in the employee's gross income in the year of the allotment. *See* Revenue Ruling 60-31, 1960-1 Cum. Bull. 174; Treasury Regulation 1.451-2; *Doty v. U.S.*, 323 F.2d 649 (6th Cir. 1963); *E. T. Sproull v. Commissioner*, 16 T.C.C. 244, *aff'd* 194 F.2d 541 (6th Cir. 1952). It is argued that the provisions of the Plan relating to the Debtor's right to use the Fund's assets for corporate purposes were not necessary to secure preferential tax treatment to the participants; but rather, these provisions were included to insure deductibility by the company of contingent compensation allotments at the time payments were made under the Plan. Assuming this to be true, one could hardly criticize management for such action: no inference of overreaching can be drawn. Moreover, nothing in the record negates the natural assumption that the corporate use provisions were included for the independent purpose of having the Fund's assets available should the need arise. I found unacceptable the suggestion that the clear language of the Plan documents should be brushed aside as unimportant because inserted in part for tax purposes. To put the matter in a nutshell, in order to immunize the allotments from current taxation as income of the participants, and to insure deductibility by the employer, the parties set up a program which was vulnerable in bankruptcy. The Trustees' proposals represent a reasonable attempt to mitigate the adverse impact of bankruptcy, while preserving the tax consequences which were bargained for.

A further argument is made by some of the objectors that they were unaware of all of the ramifications of the Contingent Compensation Plan, believed that their 'contributions' were being held for them in trust, and would have sought employment elsewhere had they known of the true situation. The record does not support these assertions. While it is apparently correct that the participants did not see, and may not have had access to, the documents establishing the Plan, they were furnished, from time to

time, summaries of these documents. These summaries appear in the record as follows: Exhibit C-1, dated December 29, 1952; C-2, dated May 20, 1955; C-3, dated January 20, 1956; C-4, dated September 25, 1963; C-5, dated February 1, 1968; and C-6, dated October 1, 1969. I have carefully reviewed all of these informational summaries and find that, while there are some variations in style and emphasis, all fairly and accurately portray the true nature of the Plan, in reasonably brief and non-technical language. In every case, the concluding section plainly states: "The assets of the contingent compensation reserve fund remain assets of the [railroad company] and subject to the rights of all creditors of the company. . . ." Moreover, there is actually no evidence in the record that any participant misunderstood the situation.

III. THE $50,000 LIMITATION

By Order No. 12 in these proceedings, I directed that, until further order of Court, no payments be made from the estate of the Debtor to or on behalf of persons no longer employed by the Debtor on a full-time basis, at a rate in excess of $50,000 per annum. This Order remains in effect, and the Trustees propose to incorporate that limitation in the interim arrangements now under discussion.

As to six participants in the Contingent Compensation Plan (Messrs. Symes, Greenough, Saunders, Bevan, Perlman and Smucker), the effect of this limitation would be to reduce or eliminate their current participation in the Contingent Compensation Plan, by reason of the amounts being paid them currently under various aspects of the pension program. At the present time, by reason of Order No. 12, no retired employee is receiving more than $50,000 per year, in the aggregate, from the Debtor's retirement and contingent compensation programs. Counsel for all parties appear to be in agreement that participation in the fully funded plan (the Plan for Supplemental Pensions) cannot

be thus limited. Mr. Symes is entitled to receive $52,776.12 per year from the funded plan, and Mr. Greenough is entitled to receive $68,478.68 per year from that program. Under the Trustees' proposal Mr. Greenough's contingent compensation would be the value of his units, $222,140.87, less contingent compensation paid, $200,000, or $22,214.08, divided by the appropriate number of payments remaining to be paid under the Plan. The $50,000 limitation would preclude payment of that amount. Mr. Symes is entitled to no contingent compensation under the Trustees' proposal, since he has already received far more than either his original allotments or the value of his units on December 31, 1970. A special $10,000 per year benefit granted Mr. Symes by the Board after his retirement would also be precluded by the $50,000 limitation. Similarly, Mr. Smucker would not receive $5,515 from the unfunded programs that he would otherwise be entitled to, nor would he receive his contingent compensation payment computed at the valuation date of $11,154.15 per annum.

In the case of Mr. Perlman, his entitlement under the funded plan is $41,709.84 per year, which is being paid him. But for the $50,000 limitation, he would be entitled, under the Trustees' proposal, to receive $23,297.22 per year from the Contingent Compensation Plan. Application of the $50,000 limitation would reduce his participation in the Contingent Compensation Plan to approximately $8,200 annually.[1]

In the case of Mr. Bevan, his entitlement under the funded plan is $27,437.27 annually, and under other retirement programs an additional $50,194.24 annually. By reason of the application of the $50,000 limitation, his participation in the unfunded pension programs would be reduced,

1. Shortly before reorganization, the Board of Directors entered into a further contract with Mr. Perlman, under which he would have performed services as a consultant, at a salary of $50,000 per year. This contract was disaffirmed by the Trustees before it became effective. Issues arising out of this disaffirmance are not before the Court at this time.

and his participation under the Contingent Compensation Plan would be eliminated (*i.e.*, insofar as current payments are concerned).

In the case of Mr. Saunders, he is entitled to receive annually $12,247.72 from the funded plan and $78,344.16 from other retirement programs. Application of the $50,000 limitation reduces Mr. Saunders' payments from the unfunded programs and eliminates current participation in the Contingent Compensation Plan. His entitlement under the Trustees' settlement formula would otherwise be $41,200 annually.

In the aggregate, application of the $50,000 limitation would reduce the amount payable on a current basis, under the contingent compensation plan proposal of the Trustees, by approximately $102,000 annually, and would reduce payments from the Debtor's estate under the unfunded retirement programs and otherwise in the amount of about $78,000 for the current year (this latter amount would fluctuate from year to year).

To the extent that the Trustees are required, or find it advisable, to establish a reserve to meet the obligations they propose to assume under the Contingent Compensation Plan, application of the $50,000 limitation would reduce the amount of the required reserve by approximately $1 million.

I have carefully considered all of the arguments advanced on all sides of this question, and have concluded that the $50,000 limitation originally imposed should remain in effect, insofar as that limitation can be achieved through payments within the control of the Trustees. That is to say, while neither the Trustees nor this Court can lawfully interfere with entitlements under the Plan for Supplemental Pensions (the fully funded plan), no payments should be made from the Debtor's estate during reorganization which would, as to any retiree, result in a total post-retirement income from all sources related to the Debtor (*i.e.*, the funded plan, the unfunded retirement programs, and the Contingent Compensation Plan) in excess of $50,000 per year.

In my view, it would be unconscionable to permit the payment in full of all retirement and deferred compensation, no matter how generous the amount, while the Debtor is unable to pay current taxes, or, for example, to pay pre-bankruptcy personal injury claims for which it is legally liable. Conversely, elimination of all pension and deferred compensation payments from the Debtor's estate would be unduly harsh and, as noted above, would be likely to interfere with the smooth functioning of the railroad. The only acceptable solution is to impose a limitation of some kind.

It has been suggested that the only fair way to impose such a limitation would be on a percentage basis. I reject this approach, believing it would probably involve greater inequities than the flat limitation proposed. Moreover, a percentage reduction might make it difficult for retirees at the lower end of the scale to maintain themselves comfortably, and would permit payments to retirees at the higher end of the scale at unreasonably generous levels. While it is true that the flat $50,000 limitation has a greater dollar impact upon some retirees than others, it assures all retirees of a reasonably comfortable standard of living; moreover, for the most part, the retirees at the higher end of the scale achieved that position as the result of pre-bankruptcy salary policies which are most clearly vulnerable to criticism. On balance, I believe the $50,000 limitation represents an acceptable resolution of these competing considerations.

IV. IMPLEMENTATION

The Trustees originally proposed to set aside $2.6 million of the assets of the Contingent Compensation Reserve Fund in a separate fund, as a reserve against the payments which they are willing to assume under the Plan. They now propose to eliminate this reserve, and to make payments under the Plan "as cash permits." For the reasons previously discussed, it is clear that the entire Fund may be utilized, free and clear of claims of the participants. The

question remains, however, whether it would be desirable for the Trustees to expend the entire Fund to meet other current operating expenses, without regard to the obligations which the Trustees propose to assume.

It may well be that, if it should become necessary to choose between using the entire Fund or shutting down the railroad, the former would be the appropriate choice. But until such a choice becomes absolutely necessary, on the basis of actual rather than projected figures, I believe the $2.6 million should be held intact, as a reserve to meet the obligations assumed by the Trustees.

The Trustees' settlement proposal would have required participants to release all further claims arising under the Plan in order to receive current payments computed on the basis of (a) their total allotments, or (b) their share of the value represented by the Fund as of December 31, 1970, whichever was less; all payments previously received to be credited on account. They would thus have forever lost any right to claim a share in the incremental values in the Fund. On the other hand, they would have received payment during reorganization, and would have shared in any increase in the $2.6 million set aside for their benefit.

The arrangement approved herein embodies the following features: (1) the same formula for determining current payments is retained; (2) the validity of the participants' claims for the full amounts due under the Plan, calculated as of December 31, 1970, is preserved; (3) questions as to the participants' rights to share in the growth of the Fund from December 31, 1970 to the present date remain open for future determination; (4) $2.6 million of the Fund will not be used for operating expenses unless so ordered by this Court in the case of absolute necessity; (5) to the extent that the $2.6 million reserve now being established may grow through investment, and is not used for operating expenses, the Trustees may at some future time be authorized to permit the participants to share in such growth.

I do not now decide that the participants could not lawfully be required to give up all further claims in exchange for current partial payment, but merely that there is room for doubt on the subject, and that the arrangements outlined above seem preferable.

Certain indenture trustees take the position that, while the entire Fund belongs to the Debtor's estate, free of any claims of the participants, it is subject to the lien of the trustees' certificates guaranteed by the federal government, and cannot be used to meet operating expenses except on the strength of a present decision by this Court that the lien of the trustees' certificates, as to encumbered assets of the Debtor, is reduced by that amount. I do not believe that issue is ripe for decision at this time. The government does not object to the Trustees' proposal, and I am satisfied that the use of unencumbered assets to meet operating expenses is entirely consistent with the Emergency Rail Services Act of 1970 (45 U.S.C. §§661-69) and the terms of the government's guarantee. For this Court now to attempt to forecast all of the possible legal consequences would serve no useful purpose.

V. CONCLUSIONS

1. The fully funded Plan for Supplemental Pensions should remain in full force and effect, unimpaired by the Debtor's bankruptcy. The Trustees should be authorized to continue to make contributions thereto, as a cost of doing business.

2. Subject to the limitation hereinafter mentioned, the Trustees should continue to make payments required by the various unfunded pension programs, as a cost of doing business.

3. Participants in the Contingent Compensation Plan have no legal or equitable interest in or claim to the assets in the Contingent Compensation Reserve Fund. Each participant in the Contingent Compensation Plan has a valid claim for the full amount to which he is entitled under

the terms of the Plan, but the Trustees should be authorized and directed to recognize such claims during reorganization only to the extent represented by the formula proposed by the Trustees in settlement (*i.e.*, reimbursement of accrued allotments, or pro rata share of the Fund as of December 31, 1970, whichever was less); and such claims should be paid during reorganization only as cash permits. Unless and until otherwise ordered by this Court, the Trustees should set aside and reserve the sum of $2.6 million in order to meet these payments.

4. During reorganization, the Trustees should make no payments from the estate of the Debtor (whether by reason of unfunded retirement programs, or the Contingent Compenstion Plan) where the effect of such payment would be that the aggregate amount received by a retired employee from all sources related to the Debtor (*i.e.*, the Plan for Supplemental Pensions, unfunded retirement programs, and the Contingent Compensation Plan) would exceed $50,000 per annum).

Appropriate orders will be entered in conformity with the views expressed herein.

ORDER NO. 1087

Authorizing the Trustees to Carry Out the Provisions of Certain Pension Programs, and to Make Certain Payments on Account of Obligations Arising Under the Contingent Compensation Plan.

AND NOW, this 26th day of January, 1973, upon consideration of the various Petitions of the Trustees relating to the retirement and contingent compensation programs of the Debtor (Documents Nos. 740, 1226, 1793 and 1794), and after hearings thereon duly noticed, it is ORDERED:

1. The Trustees are authorized to continue in effect the Plan for Supplemental Pensions, in conformity with Order No. 278, and to make all payments required to implement the same.

2. Subject to the limitation set forth in paragraph 5 of this Order, the Trustees are authorized to continue in effect all of the existing pension programs and policies of the Debtor, and to make all payments required to implement the same.

3. Subject to the limitation set forth in paragraph 5 of this Order, from time to time during reorganization, as cash permits, the Trustees are authorized to pay to eligible participants in the (former) Contingent Compensation Plan of the Debtor amounts determined—in each case by the following formula, viz, (a) the lesser of (i) the total allocations to such participant, or (ii) an amount equal to the value of such participant's share of the Contingent Compensation Reserve Fund as of December 31, 1970, less (b) the aggregate amount of payments heretofore made to such participant or account of his participation. All payments to participants during reorganization shall be made on a pro rata basis in relation to the amounts thus determined. Except as herein provided, disposition of all further claims on behalf of participants in the (former) Contingent Compensation Plan of the Debtor is deferred pending adoption of a reorganization plan.

4. It is adjudged and declared that the assets in the Contingent Compensation Fund are the property of the trustees, free and clear of all claims, legal or equitable, of the participants or former participants in the Contingent Compensation Plan.

5. In no event shall the Trustees make any payment to or on behalf of any former officer or employee of the Debtor where the effect of such payment would be the receipt by such former officer or employee, from the Plan for Supplemental Pensions, all other unfunded retirement programs of the Debtor, and the Contingent Compensation Plan, in the aggregate, of more than $50,000 per annum.

JOHN P. FULLAM, J.

Appendix C

[LETTERHEAD OF]

LAW OFFICES

BLANK, ROME, KLAUS & COMISKY

October 6, 1970

Joseph G. Manta, Esq.
LaBrum and Doak
1500 Seven Penn Center Plaza
Philadelphia, Penna. 19103

Re: Penn Central Transportation Co.
David C. Bevan

Dear Mr. Manta:

Pursuant to your letter dated September 15, 1970, addressed to Mr. Charles A. Stiteler at Penn Central Transportation Co., I submit the following information with respect to your client, Mr. Bevan:

1. Mr. Bevan was a member of the Penn Central Transportation Co. Supplemental Pension Plan, and the Managers of this plan have computed his monthly pension thereunder as $2,362.06 effective August 8, 1970, after reduction for the option chosen by Mr. Bevan for a survivorship benefit. Mr. Bevan was also made subject to the Penn Central Transportation Co. Special Pension Policy granting him credit for constructive service, and his pension thereunder has been computed as $2,326.65 per month, after reduction. Mr. Bevan was further subject to the supplement to the Penn Central Transportation Co. Contingent Compensation Plan granting him an additional retirement benefit based upon his contingent compensation, which pension has been computed at $1,747.12 per month. Finally,

Mr. Bevan's benefits under the Interim Pension Policy has been computed as $182.45 per month until age 65 when he becomes entitled to Railroad Retirement Act benefits. These computations have not been verified by the Trustees and do not represent a final determination by the Trustees as to the rights of Mr. Bevan under the several plans.

2. The amount of contingent compensation allocated to Mr. Bevan's account in the Contingent Compensation Plan was valued at $566,333.26, which, subject to the terms of the plan, is payable to him in ten (10) annual installments commencing March 15, 1972.

3. The Penn Central Transportation Co. Supplemental Pension Plan was commenced on June 1, 1938. It has remained contributory to the present time as to employees covered by collective bargaining agreements; employees contributions were terminated effective February 1, 1965 as to non agreement employees.

4. February 1, 1965.

5. The supplement to the Contingent Compensation Plan providing for additional retirement benefits based upon an officer's contingent compensation became effective on August 1, 1968. The terms of the supplement have been made part of the record in the Section 77 proceedings and speak for themselves.

6. The terms of the Penn Central Transportation Co. Supplemental Pension Plan have been made part of the record in the Section 77 proceedings and have been provided to Mr. Bevan.

7. The Managers of the Supplemental Pension Plan are:

S. H. Hellenbrand, Chairman
R. G. Flannery
E. G. Kreyling, Jr.
J. A. McDonald
C. S. Hill
J. J. Maher
(Vacancy—resignation of R. W. Minor)
C. A. Stiteler, Secretary (not a Manager)

8. There are approximately 23,373 active employees of Penn Central Transportation Co. eligible to participate in the Supplemental Pension Plan. An additional 212 terminated employees have vested interests in the plan payable at retirement, and approximately 14,949 retired employees are receiving pensions under the plan.

9. June 28, 1961

10. The Special Pension Policy has been made part of the record in the Section 77 proceedings and speaks for itself.

11. 18 active employees, 11 retired employees.

12. December 1, 1961.

13. Contingent compensation allocated to officers was credited to a contingent compensation reserve fund as permitted under the plan.

14. The Contingent Compensation Plan has been managed by the Secretary of the corporation, with assistance from the Director of Personnel Accounting and Employees Benefits.

15. As of June 30, 1970, there were 67 active employees, 38 retired employees, 16 terminated employees and 2 widows who were participants in the Contingent Compensation Plan or eligible for benefits thereunder in accordance with the terms thereof.

16. March 1, 1963.

17. The provisions of the Interim Pension Policy have been made part of the record in the Section 77 proceedings and speak for themselves.

18. There are 705 persons currently receiving benefits under the Interim Pension Policy. It is impossible to determine the number of potential beneficiaries since there are too many variables.

I hope that the above answers all of the questions contained in your letter of September 15, 1970. If you have further questions concerning this matter, please feel free to call me at any time.

Sincerely yours,

GONCER M. KRESTAL

GMK/m

October Term, 1973

Nos. 73-854, 73-964, 73-1039

IN THE MATTER OF

PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

DAVID C. BEVAN, *Petitioner in No. 73-584*
ALLEN J. GREENOUGH, *Petitioner in No. 73-964*
TWENTY-ONE RETIRED EMPLOYEES,
Petitioner in No. 73-1039

v.

TRUSTEES OF PENN CENTRAL TRANSPORTATION COMPANY

BRIEF FOR RESPONDENTS IN OPPOSITION

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THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

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1 Scott, Trusts §23, at pp. 190-91, §74.3, at p. 682 (3d ed. 1967) 14

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did the United States District Court for the Eastern District of Pennsylvania (Reorganization Court) in the proceedings for the reorganization of Penn Central Transportation Company (Penn Central) properly exercise its discretion in denying preferential payment to the participants of The Penn Central Contingent Compensation Plan (CCP) of the entire amounts due them under the CCP on account of services rendered to Penn Central prior to the institution of the reorganization proceedings?

2. Are the assets of the Contingent Compensation Reserve Fund (Reserve Fund) maintained by Penn Central for the purpose of meeting its obligations under the CCP to retired participants the property of the Trustees of the Property of Penn Central (Trustees), free and clear of any claims of the participants, in view, *inter alia*, of the express language of the CCP which provides:

> The Fund shall not be a trust fund and the assets therein shall be available at all times for any corporate purpose of the Company. A participant shall have no right in or to any funds or property which may be held in the Fund?

3. Did the Reorganization Court properly exercise its discretion in imposing a $50,000 per annum limitation upon the payment of unfunded retirement benefits to each of six retired highly paid executives of Penn Central?

COUNTER-STATEMENT OF THE CASE

The instant matter arises out of the affirmance by the United States Court of Appeals for the Third Circuit (Court of Appeals) of Order No. 1087 of the Reorganization Court. Order No. 1087 authorizes the Trustees:

> (1) to continue in existence, and to make payments to retired employees under, Penn Central's several funded and unfunded retirement programs;
>
> (2) to make partial payments during reorganization, in the approximate total amount of $2.6 million, as cash permits, to the participants of the CCP, in accordance with a formula approved by the Trustees and accepted by 81 of the 121 participants, without prejudice to the further determination of the participants' claims for payment of their full accounts in the CCP; and
>
> (3) To make additional contributions to the independent trust which funds the Penn Central Plan for Supplemental Pensions (Supplemental Pension Plan).

The payments to be made by the Trustees under Order No. 1087 are subject to an express condition limiting the annual unfunded benefits receivable by anyone of Penn Central's former employees under all of the retirement programs and the CCP to $50,000 per year.[1] This limitation applicable to only six of Penn Central's former executives, does not affect payment of benefits in excess of $50,000 solely out of the funded Supplemental Pension Plan.[2]

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1. The limitation was originally imposed by the Reorganization Court by Order No. 12, dated July 10, 1970, which was applicable to all pensions payable to retired employees, including payments out of the Supplemental Pension Plan.

2. As a consequence, the annual pensions payable to petitioners Symes (No. 73-1039) and Greenough (No. 73-964) under the Supplemental Pension Plan, which were reduced to $50,000 by Order No. 12 of the Reorganization Court, have been reinstated to the full amounts ($52,776.12 in the case of Symes and $68,478.60 in the case of Greenough) due them under the Plan.

The Reorganization Court, in Order No. 1087, further declared that the assets of the Reserve Fund established under the CCP, having an approximate value of $10 million, were the property of the Trustees, free and clear of any claims by the participants, and in an accompanying Order, No. 1088, directed the liquidation of the Reserve Fund. Order No. 1088 required the Trustees to set aside in reserve out of the assets or proceeds of the Reserve Fund the amount of $2.6 million to meet the payments authorized under Order No. 1087, and authorized the Trustees to utilize the remaining $7.4 million to meet current expenses of operating Penn Central's railroad.

Both the Reorganization Court and the Court of Appeals refused to stay the liquidation authorized under Order No. 1088. As a consequence, the Reserve Fund has been liquidated and the proceeds have been applied in accordance with Order No. 1088, *i.e.*, $2.6 million has been reserved for the participants and the balance has been expended for current operating expenses.

Appeals were taken from Orders No. 1087 and 1088 on behalf of 32 retired executives of Penn Central, or estates of deceased executives, who were participants in the CCP, including the six individuals affected by the $50,000 limitation. These appeals were consolidated for argument before the Court of Appeals and, on August 21, 1973, the Court of Appeals rendered a decision affirming Orders Nos. 1087 and 1088. In this respect, the Court of Appeals expressly held that the assets of the Reserve Fund were not trust funds and that the participants in the CCP merely had unsecured claims against the Penn Central estate for the amount of their interests in the plan. It was further determined that the Reorganization Court had not abused its discretion by limiting the payment out of the estate of unfunded benefits due retired employees of Penn Central both under the CCP and Penn Central's other retirement programs.[3] Applications for rehearing were denied by the Court of Appeals on October 9, 1973.

3. One judge dissented in part only insofar as the Reorganization Court had denied payment to one of the appellants, petitioner

There is presently before this Court a total of three petitions for writs of certiorari, involving twenty-three petitioners, seeking review of the Court of Appeals' decision. This brief is submitted in response to all three petitions.

The facts with respect to Penn Central's retirement programs, the CCP and the effect of the $50,000 annual limitation upon the payment of retirement benefits are as follows:

A. *Facts Relating to Penn Central Retirement Programs*

Although the CCP provides payments to the participants after their retirement, it is not the exclusive, nor the primary, source of retirement benefits payable to retired employees of Penn Central. On the contrary, it is a program the participation in which was limited to a select group of highly compensated executives of Penn Central which was established for purposes different than those giving rise to the normal pension plan. The retirement benefits payable under the CCP are merely incidental to its primary purpose of deferring receipt of a portion of the participants' compensations and are supplemental to the retirement benefits payable to the participants both under the Railroad Retirement Act, 45 U.S.C. §228(a), and under Penn Central's general retirement programs.

Aside from the Railroad Retirement Act, which covers all of Penn Central's employees, the basic pension plan applicable to Penn Central's employees, principally those not covered by collective bargaining contracts, is the funded Supplemental Pension Plan. The benefits under this Plan, are payable out of a trust funded primarily by contributions made by Penn Central and its predecessors.

Note 3—*Continued*

James M. Symes (No. 73-1039), of a special pension of $10,000 a year, in addition to his pension of $52,776 payable under the Supplemental Pension Plan, awarded several years *after* his retirement.

The Supplemental Pension Plan is augmented by a number of other programs which are more limited in scope and coverage and which provide benefits payable directly by Penn Central. These include, insofar as relevant hereto:[4]

(a) The Policy of June 28, 1961, which provides retirement benefits, in addition to those payable under the Supplemental Pension Plan, to employees whose employment began subsequent to their thirty-fifth birthday and who earned $20,000 or more a year to reflect prior service (up to a maximum of twenty years) with another railroad or other company.

(b) Supplement A to the CCP which provides retirement benefits, also in addition to those payable under the Supplemental Pension Plan, to participants of the CCP who retired between August 1968 and June 1970 based upon the participants' contingent compensation allotments.

Almost all of the petitioners continue to receive substantial pensions under the Supplemental Pension Plan based upon their years of service and compensation, and a number further receive additional benefits under one or more of the other Penn Central retirement programs. No appeal has been effected from that portion of Order No. 1087 authorizing the continuation of these programs.

B. *Facts Relating to Contingent Compensation Plan*

The CCP was established by Penn Central's predecessor, The Pennsylvania Railroad Company, on November 26, 1952. Under the CCP, Penn Central awarded to those employees selected as participants, limited to executives

4. The remaining unfunded retirement plans maintained by Penn Central are as follows: New York Central Railroad Company unfunded Supplementary Pension System; New York, New Haven and Hartford Railroad Company unfunded pension plan; Penn Central Interim Pension Policy.

and professionals having annual cash salaries in excess of $30,000, allotments of contingent compensation in addition to their regular salaries. This contingent compensation was not payable immediately in cash but rather in ten annual installments after the termination of the participant's employment or attainment of age 65, whichever was later, or in a lump sum or installments (depending upon time of death) to the participant's beneficiary or estate upon death. Until paid, all amounts allocated under the CCP are subject to forfeiture under certain circumstances. Amounts allotted under the CCP were treated as operating expenses of Penn Central but were not reported as compensation paid to the participants, nor were they then taxable as income to the participants.

The CCP authorized, *but did not require*, the establishment of the Reserve Fund, as a separate fund to be maintained by Penn Central into which amounts equal to the contingent compensation allotments could be transferred for the purpose of investment and providing a source for the payments to participants when due under the CCP. The Reserve Fund was established concurrently with the adoption of the CCP and amounts equal to the contingent compensation allotments were transferred thereto monthly by Penn Central. All of the assets of the Reserve Fund were derived solely from these monthly payments by Penn Central. *No monies were ever paid to the Reserve Fund by the participants.*

Under the CCP, the amount of each participant's interest in the Plan was stated in terms of units of the Reserve Fund, the value of which would increase or decrease depending upon the growth of the fund by way of income and unrealized gain. All payments to be made to a participant at retirement were to be based upon the value of the participant's units in the CCP at the time of payment.

In June 1970, the Board of Directors of Penn Central suspended the operation of the CCP and no further contingent compensation allotments have been allocated to the participants since that time. Moreover, since the institution

of the reorganization proceedings on June 21, 1970, no payments have been made out of the Reserve Fund to the participants.

Order No. 1087 provides for the payment to the participants of that portion of their interests in the CCP as of December 31, 1970 equal to the principal amount of their contingent compensation allotments less any payments previously made under the Plan, subject to the $50,000 per annum limitation. The balance of the participants' interests in the CCP represents the appreciation in value of the investment of the Reserve Fund together with most of the unpaid contingent compensation allotments of the six participants whose annual payments are restricted to $50,000.

The petitioners herein were high salaried executives, most of whom participated in the CCP from its inception and whose accounts in the Plan increased substantially in value over the amount of their contingent compensation allotments as a result of the favorable investment by Penn Central of the assets of the Reserve Fund. In some cases, the sums already distributed to these participants far exceed the amounts originally allocated to their accounts.

C. *Facts Relating to $50,000 Per Annum Limitation*

The $50,000 per annum limitation upon the payment of unfunded retirement benefits imposed by the Reorganization Court affects only six former executives of Penn Central, four of whom are petitioners herein. The effect of Order No. 1087 on the payment of benefits to these four individuals is as follows:

1. James M. Symes (No. 73-1039)

Under Order No. 1087, petitioner Symes is entitled to receive his full benefits under the funded Supplemental Pension Plan in the annual amount of $52,776.12. The $50,000 limitation affects the current payment of an additional $10,000 pension awarded to him five years after

retirement and which is *not* funded. Mr. Symes was further denied preferential payment of the $190,505 remaining in his account in the CCP. This results both from the $50,000 per annum limitation and from the fact that the payments to him under the Plan prior to reorganization, $440,451.64, far exceeded the amount of his allotments, $251,096.23.

2. David C. Bevan (No. 73-854)

Under Order No. 1087, the annual benefits payable to petitioner Bevan have been limited to $50,000, of which $22,562.76 is paid by Penn Central directly from current operating receipts, the balance of $27,437.28 being paid under the funded Supplemental Pension Plan. The principal effect of this limitation is to reduce the benefits currently paid to Bevan under the Policy of June 28, 1961 and Supplement A to the CCP and to eliminate current payments to Bevan of the sums credited to his account in the CCP.

2. David E. Smucker (No. 73-1039)

Under Order No. 1087, the annual benefits payable to petitioner Smucker have been limited to $50,000, of which $9,693.96 is paid by Penn Central directly from current operating receipts, the balance of $40,306.08 being paid under the Supplemental Pension Plan. The principal effect of this limitation is to reduce minimally the unfunded retirement benefits currently paid Smucker under Supplement A to the CCP and to eliminate all current payments to him under the CCP.

4. Allen J. Greenough (No. 73-964)

Under Order No. 1087, petitioner Greenough is entitled to receive his full pension under the Supplemental Pension Plan in the annual amount of $68,478.60. The $50,000 limitation affects only the current payment of that portion ($22,140.87) of Mr. Greenough's contingent compensation allotments, which were in the total sum of $222,140.87, in excess of the $200,000 already paid to him

under the CCP prior to reorganization. Mr. Greenough was further denied preferential payment of the balance of his interest in the CCP, in the amount of $541,335.55, representing increases in the value of the Reserve Fund, on the basis of the formula applicable generally to the participants.

REASONS FOR DENYING THE WRIT

1. The Reorganization Court Properly Exercised Its Discretion in Denying Preferential Payment to the Participants of Their Full Interests in the CCP.

The courts below recognized, as do the Trustees, that petitioners have legitimate executory contractual claims against Penn Central under the CCP.[5] These claims arise out of "services" rendered Penn Central *prior* to the institution of the reorganization proceedings. As a general rule, unsecured claims of this nature are not entitled to preferential payment during the reorganization proceedings, but are subject, as are other pre-reorganization claims, to determination as part of the proof of claim procedure and to disposition as part of the plan of reorganization.[6] As noted by the Court of Appeals, this is true whether or not petitioners' rights under the CCP became vested upon their respective retirements.[7]

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5. The Reorganization Court did not hold, as intimated by petitioner Bevan that this contractual claim was in any way affected by the establishment of the Reserve Fund. It merely determined that the CCP did not create any property rights in favor of Bevan in the Reserve Fund which would justify a preferential payment to him of his contractual claim. This misinterpretation of the Reorganization Court's decision, as well as many of the other statements and arguments made in the Petition at No. 73-584 are the result of Bevan's inability or refusal to accept the simple rule of bankruptcy law that unsecured contractual claims for services rendered prior to reorganization are not entitled to preferential payment during reorganization.

6. *Frasher v. Robinson*, 458 F.2d 492 (9th Cir. 1972); *Kooy v. Van Winkle*, 88 F.2d 181 (3d Cir. 1937).

7. The cases cited by petitioner Greenough at pages 9-11 of his petition merely hold that a pensioner has a vested contractual right to retirement benefits under a pension plan which cannot be terminated by the employer in the absence of a bankruptcy or reorganization proceeding. They do not purport to discuss the rights of a pensioneer as an unsecured creditor in a proceeding of this character and are not relevant to the issues before this Court.

The Reorganization Court, having concluded that the rights of Penn Central's retired employees under the CCP were merely contractual in nature, nevertheless authorized the preferential payment of limited benefits thereunder in accordance with the principles enunciated in *Bowen v. Hockley*, 71 F.2d 781 (4th Cir. 1934) and *Tate v. New York, N.H. & H.R.R.*, 332 F.2d 449 (2d Cir. 1964). These cases reflect a practice by railroad reorganization courts under Section 77 of the Bankruptcy Act, 11 U.S.C. §105, to authorize the continued payment of unfunded pensions falling due under a railroad's regular pension program.[8]

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8. In *Tate v. New York, N.H. & H.R.R.*, 332 F.2d 449 (2d Cir. 1964), the Court of Appeals reversed an order of the District Court in a railroad reorganization proceedings, which terminated payments to a retired executive of the railroad under a special contract providing reasonable retirement benefits ($13,000 a year) substantially similar to those payable under the railroad's formal pension plan, except that credit was given to him for service with a prior employer. The executive, in leaving his former employer, had forfeited all of his pension rights to date of termination, and it is a standard practice in the railroad industry to provide credit for prior service under such circumstances.

In *Bowen v. Hockley*, 71 F.2d 781 (4th Cir. 1934), the Court extended the rule to permit the continued payment during an equity receivership of a disability benefit awarded an injured employee prior to the institution of the proceedings under a state workmen's compensation statute. The debtor was self insured under the statute and the direct payments to the injured employee were considered to be in the same category of necessary operating expenses payable currently as would premium payments to an insurance company for coverage against future compensation awards during the receivership.

But, see *Alpert v. New York, N.H. & H.R.R.*, 348 F.2d 304 (2d Cir. 1965), where the Court of Appeals for the Second Circuit affirmed the denial of sums due a railroad's retired chief executive officer under his employment contract which provided for payment of $25,000 a year after retirement "by way of deferred compensation". The Court of Appeals drew a sharp distinction between contracts like Tate's, providing a pension similar to that payable under the railroad's regular pension plan, which should be paid for the purpose of maintaining and facilitating employee loyalty, incentive and recruitment, and contractual provisions for deferred compen-

The preferential payment of retirement benefits under *Tate* and *Bowen* is based upon the equitable factor of employee morale and not upon the contractual rights of the retired employees. Thus, the amount of pension authorized to be paid is not fixed by the terms of the contract or pension plan, but must be determined independently by the district court on the basis of equity and fairness under the circumstances. *Tate v. New York, N.H.&H.R.R.*, 332 F.2d at 452. Consistent with this teaching, the Reorganization Court, within its discretion, authorized the current payment of that portion of the participants' interests in the CCP attributable to the contingent compensation allotments (less prior payments under the CCP) and deferred consideration of the balance of their claims attributable to the increased value of the assets of the Reserve Fund until the adoption of a plan of reorganization.

In view of the extraordinary nature and limited coverage of the CCP and the fortuitous nature of the investment experience of the Reserve Fund, the Reorganization Court cannot be held to have abused its discretion in this regard. Petitioners have presented no sound reasons in any of their petitions for this Court to review the exercise of that discretion.

2. The Participants Have No Property Interests in the Assets of the Reserve Fund.

One of the arguments asserted in the Court of Appeals, and repeated by petitioners Bevan and Greenough

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Note 8—*Continued*

sation unrelated to the normal pension formula and serving none of these purposes. See also *Pyrites Co. v. Silica Gel Corp.*, 8 F.Supp. 423 (D.Md. 1934) (pre-receivership compensation denied to executives; granted to other employees); *In re Compania De Los Ferrocarriles De Puerto Rico*, 76 F.Supp. 521 (D.P.R. 1948) (pension discontinued as to executives; continued as to employees covered by labor contract); *In re Schenectady Ry.*, 93 F.Supp. 67 (N.D.N.Y. 1950) (pension suspended as to executives; continued as to employees covered by labor contract).

herein, is that they have more than mere unsecured contractual claims against Penn Central's estate. Rather, they assert a beneficial property interest by way of a trust—express, constructive or resulting—in the specific assets of the Reserve Fund and contend the courts below have improperly deprived them of their rights to those assets contrary to the decisions of this Court.[9]

The complete answer to petitioners' position in this respect is found in the CCP itself. Section 401 of the CCP provides:

> The Fund shall not be a trust fund and the assets therein shall be available at all times for any corporate purpose of the Company. A participant shall have no right in or to any funds or property which may be held in the Fund.

Section 1201 further provides:

> No participant nor any other person shall have any interest in any fund or in any specific asset or assets of the Company by reason of amounts contingently allotted to him. . . .

This language is as clear as can be and, as held by the courts below, sufficiently negates the existence of a trust relationship with respect to the Reserve Fund.[10] An ex-

9. The petition in No. 73-584 relies upon the decision in *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962). In *Pearlman*, this Court held that a Miller Act surety which had paid its principal's laborers and materialmen had an equitable claim for reimbursement out of the amounts retained by the United States to secure such payments, and that the principal's trustee in bankruptcy had acquired no property rights in the fund to the extent of the surety's equitable interest. The basis for the *Pearlman* decision, and all of the other decisions cited by petitioners Bevan and Greenough, is an identifiable fund or property in which the claimant can show a property interest, legal or equitable, superior to that of the bankrupt. As hereinafter discussed, petitioners did not have any property interest in the assets of the Reserve Fund entitling them to priority of payment of their entire interests in the CCP.

10. It is no answer to state, as Bevan has to this Court, that the clause making the assets available to Penn Central demon-

press trust cannot arise unless there has been an outward manifestation of intent on the part of the alleged settlor that the property should be held in trust (I Scott, Trusts §23, at pp. 190-91, §74.3, at p. 682 (3d ed. 1967)). *A fortiori*, there can be no trust relationship where the purported settlor has stated that no trust relationship is intended by his actions.

There was, moreover, no conduct on behalf of Penn Central contrary to the terms of the CCP. The Reserve Fund remained at all times in the custody of Penn Central's Treasurer available for corporate purposes, and was accounted for as an asset of the company. The mere fact that the officers of Penn Central, almost all of whom were participants, did not take advantage of the right to use the property in the Reserve Fund for general railroad purposes does not indicate that the intent of the Board of Directors was contrary to that expressly set forth in the CCP, nor does it indicate that the status of the property of the Reserve Fund was other than a corporate asset.

Petitioner Bevan's assertion that there is a resulting or constructive trust in the Reserve Fund, notwithstanding the terms of the CCP, because the contingent compensation allotments transferred thereto were the participants' property begs the question. The participants made no contributions of cash or property. Rather, in lieu of receiving their total compensation in the form of immediate cash salaries, they acquired contractual rights against Penn Central to receive deferred compensation after retirement to be measured by their interests in the Reserve Fund.

It is clear that the assets of the Reserve Fund remained at all times the sole property of Penn Central and were not

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Note 10—*Continued*

strates that the assets were not in fact the property of Penn Central, absent specific language to that effect. The respective rights of the participants and Penn Central to these assets can be based only upon the express provisions of the CCP, and petitioners can have no greater rights than are conferred under these provisions. *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527 (3d Cir. 1970).

held in trust for the participants. As a consequence, the participants have no claim to these assets, but merely have a contractual right against Penn Central's estate. The decision of the Courts of Appeals denying participants' claim for priority is therefore not inconsistent with any decision of this Court and should not be reviewed by this Court.

3. The Reorganization Court Properly Exercised Its Discretion in Imposing the $50,000 Per Annum Limitation Upon the Payment of Unfunded Retirement Benefits.

The Reorganization Court in authorizing the preferential payment out of the Penn Central estate of unfunded pension benefits (including the partial payments under the CCP) limited the amount of benefits payable to any one former employee to $50,000 per annum. This limitation, affirmed by the Court of Appeals, is fair and equitable, and constitutes a proper exercise of the Reorganization Court's discretion which need not be reviewed by this Court.

The reasonableness of the $50,000 limitation is demonstrated by the analyses of the federal income tax returns filed for the years 1968 and 1969, published by the Internal Revenue Service,[11] which disclose that 99.6% of the wage earners filing returns reported adjusted gross incomes of less than $50,000 and an even greater proportion, 99.85%, in 1968, reported salaries or wages, as distinguished from total income, of less than $50,000.

An annual income of $50,000 should provide sufficient funds to maintain a comfortable standard of living, par-

11. Internal Revenue Service, Statistics of Income-1968, Individual Income Tax Returns, p. 27, Table 1.9 (1971); Internal Revenue Service, Statistics of Income-1969, Individual Income Tax Returns, p. 13, Table 1.4 (1971). The analysis of the federal income tax returns for the year 1970 discloses a similar percentage, 99.4% of total tax payers, as distinguished from wage earners, reporting adjusted gross income of less than $50,000. Internal Revenue Service, Statistics of Income-1970, Individual Income Tax Returns, Table 1 (1973). See also Fox, Top Executive Pensions-1969, The Conference Board Record, Vol. VIII, No. 1, January 1971.

ticularly in retirement when a family's responsibilities are generally less. In view of the present financial condition of Penn Central, it would be highly inequitable to provide over-generous payments to retired employees out of Penn Central's estate while other claimants, many in hardship situations, are receiving nothing. As noted by the Reorganization Court, ". . . it would be unconscionable to permit the payment in full of all retirement and deferred compensation, no matter how generous the amount, while [Penn Central] is unable to pay current taxes. . . ."

The only specific challenge as to the fairness of the $50,000 limitation is petitioner Bevan's complaint that it discriminatorily limits payments out of Penn Central's estate to six executives while permitting full payment to all other retired employees of Penn Central under Penn Central's unfunded pension programs. As noted by the Reorganization Court, Bevan's suggestion that any limitation on payments should be on a pro-rata basis ". . . would . . . involve greater inequities than the flat limitation. . . ." and ". . . might make it difficult for retirees at the lower end of the scale to maintain themselves comfortably. . . ."

Petitioners have not stated any other ground for determining that the limitation is inequitable or that the Reorganization Court otherwise abused its discretion.[12] This Court, therefore, should not exercise its extraordinary jurisdiction to review that discretion.

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12. Petitioner Bevan, in arguing further that the $50,000 annual limitation constitutes an abuse of the Reorganization Court's discretion as applied to his interest in the CCP, merely reiterates the contentions made elsewhere in his petition that the assets of the Reserve Fund were the property of the participants, not Penn Central. As hereinbefore stated, the Courts below correctly decided that Bevan's rights under the CCP were solely contractual in nature and not entitled to any preferential treatment. This denial of preferential payment was without prejudice, however, to Bevan's right to assert his claim thereunder as part of the proof of claim procedure instituted in the reorganization proceedings.

CONCLUSION

For the above reasons, it is submitted that the refusal by the Reorganization Court to grant petitioners preferential payment of their entire interests in the CCP is not inconsistent with any decision of this Court, and that the limitation imposed upon the payment of unfunded retirement benefits payable to petitioners did not constitute an abuse of the Reorganization Court's discretion. The affirmance of Order No. 1087 by the Court of Appeals was therefore correct and need not be reviewed by this Court. The Petitions for Writs of Certiorari filed by petitioners should be denied.

Respectfully submitted,

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